Supreme Court, U. S
FILED
AUG - 7 1980
MICHAEL RODAK, JR., CLERK

80-182

No. _____

IN THE

Supreme Court of the United States

October Term, 1980

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,

Petitioner,

—v.—

JOHN B. ANDERSON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Anthony J. Celebrezze, Jr., Secretary of State of the State of Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, made and entered in the above-entitled cause on July 18, 1980, which judgment has been appealed to the Court of Appeals for the Sixth Circuit. Judgment has yet to be rendered therein.

QUESTIONS PRESENTED

1. Whether a state statute establishing a March 20, 1980, filing deadline for independent candidates for election to the office of President of the United States may be held to constitute a *per se* severe burden upon the exercise of rights guaranteed by the First

and Fourteenth Amendments to the United States Constitution such that it is invalid unless compelling state interests are shown.

2. Whether a state statute establishing a March 20, 1980, filing deadline for independent candidates for election to the office of President of the United States invidiously discriminates against such candidates in favor of political parties, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether a state statute establishing a March 20, 1980, filing deadline for independent candidates for election to the office of President of the United States is justified by the compelling state interest of preservation of political stability and does not, therefore, unconstitutionally limit rights guaranteed by either the First or the Fourteenth Amendments to the United States Constitution.

4. Whether this Court's summary affirmance in *Sweetenham v. Gilligan*, 409 U.S. 942 (1972), required the District Court to sustain the constitutionality of Ohio Revised Code § 3513.257 against First and Fourteenth Amendment challenges.

PARTIES BELOW

Additional parties aligned with respondent John B. Anderson* are respondents George H. Hetrick, Leslie Laufman, and Gerald M. Eisenstat. There are no additional petitioners.

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* In this petition, "respondent" refers to John B. Anderson alone, and "respondents" refers to all respondents collectively.

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OPINION BELOW

The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, announced on July 17, 1980 (upon which judgment was entered on July 18, 1980), has not yet been reported and appears in the Appendix (A.32)*. The United States Court of Appeals for the Sixth Circuit has not yet rendered any opinion on the judgment which is here sought to be reviewed.

JURISDICTION

The judgment of the District Court granting summary judgment in favor of the respondents herein was entered on July 18, 1980, and a copy thereof is included in the Appendix (A.31). The petitioner herein docketed an appeal in the Court of Appeals for the Sixth Circuit on July 30, 1980, pursuant to its jurisdiction under 28 U.S.C. § 1291. The Court of Appeals has not yet rendered judgment.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), providing for the granting of a writ of certiorari upon the petition of any party before the rendition of judgment by the Court of Appeals, and Rule 18 of the Rules of this Court. This petition was filed before judgment in accordance with 28 U.S.C. § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case, with the full text being set forth in the Appendix hereto:

1) Constitution of the United States, Article II, Section 1, Clause 2

2) Constitution of the United States, Amendment I

3) Constitution of the United States, Amendment XIV, Section 1

4) Ohio Revised Code Section 3513.04 (last paragraph)

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* References to "(A.)" are to pages in the Appendix hereto.

5) Ohio Revised Code Section 3513.05

6) Ohio Revised Code Section 3513.12

7) Ohio Revised Code Section 3513.257

8) Ohio Revised Code Section 3517.01(A)

STATEMENT OF THE CASE

The petitioner requests review of a judgment entered by the District Court in a suit initiated by the respondents on May 19, 1980, for the purpose of compelling the petitioner to place respondent's name on the Ohio election ballot as an independent candidate for President of the United States. Petitioner had declined to place respondent's name on the ballot because his nominating petitions and statement of candidacy were tendered nearly two months after the statutory filing deadline of March 20, 1980, had passed, Ohio Revised Code § 3513.257. Respondents' suit claimed, *inter alia,* that this filing deadline violated their rights under the First and Fourteenth Amendments to the Constitution of the United States. Jurisdiction was invoked under Article II, Article VI and the First, Fifth and Fourteenth Amendments to the Constitution of the United States; 28 U.S.C. §§ 1331, 1343(3) and 2201-02; and 42 U.S.C. § 1983.

The case was tried on a Joint Stipulation of Fact, and the briefs and oral arguments of the parties. The District Court, finding no material fact to be in issue, entered summary judgment under Rule 56, Federal Rules of Civil Procedure, on July 18, 1980. Respondents were granted injunctive and declaratory relief requiring that respondent's name appear on the Ohio ballot if his petition signatures are verified. Petitioner appealed from this judgment to the Court of Appeals for the Sixth Circuit on July 28, 1980, and judgment on this appeal has yet to be rendered.

Ohio Revised Code § 3513.257 provides relatively easy ballot access to independent candidates for office. A person seeking ballot position as an independent presidential candidate need tender petitions bearing the signatures of only 5,000 qualified electors. There is no geographical distribution requirement imposed on the signature gathering process nor is the pool of possible signers limited by any requirement that signers be disaffiliated

from political parties. Candidates have an unlimited time within which to obtain signatures. The 5,000 signatures required to be filed represent a mere .12 percent of the 4,111,873 votes cast in Ohio in the 1976 presidential election. However, an independent candidate for office must commit himself to run as an independent at the same time that a partisan candidate makes up his mind and files his nominating petitions for the primary elections. The joint filing deadline for independent candidates and partisan candidates prevents a candidate from first trying one route to the general election ballot and then, because of his lack of success, changing his mind and trying a different route.

The leniency of Ohio's ballot access requirements is shown by the ease with which numerous other persons have qualified for ballot position in Ohio as independent candidates in the past eight years. In the gubernatorial races held in 1974 and 1978, four independent candidates qualified for ballot position, one in 1974 and three in 1978. Independent senatorial candidates have also succeeded in gaining ballot position; two did so in 1974, three did so in 1976 and two filed nominating petitions appearing to bear sufficient numbers of signatures this year. Most importantly, five independent presidential candidates were accorded ballot position in 1976, and another five timely filed nominating petitions in the current year appearing to bear sufficient numbers of signatures.

Respondent, currently a member of Congress representing Illinois' 16th Congressional District, and elected from that district as a Republican Congressman every two years since 1960, announced on June 8, 1979, that he would seek the Republican nomination for President of the United States. In the period between June 8, 1979 and April 24, 1980, the date upon which respondent withdrew from the Republican race and announced his intention to seek the Presidency as an independent, he mounted a national campaign for the Republican nomination, qualifying for the Republican primary ballot in twenty-seven of the thirty-six states in which such primaries are held and engaging in some activity in support of his candidacy in the remaining fourteen states. Among those primary election states was Ohio, in which respondent filed his petitions on March 20, 1980, and he

was thereafter qualified to appear on the Republican primary ballot in this state until he withdrew from the ballot on April 24, 1980.

However, by the time of his withdrawal from the Republican primary election race on April 24, 1980, respondent had lost all of the nine primaries held by that date, and had been awarded only 55 delegates from the more than 500 delegates awarded to Republican candidates, nearly half of the 55 coming from his home state of Illinois. The District Court found in this regard (A.39) that "[respondent's] losses in each of the Republican primaries he entered prior to April 24 indicate quite clearly [that] he did not enjoy support from a majority of the Republican Party." During the course of this unsuccessful campaign, respondent had available for expenditure to promote his candidacy over 6.6 million dollars, 2.7 million dollars of which were received by his campaign from federal matching funds available only to partisan candidates.

Respondent, having decided on April 24, 1980, to withdraw from the Republican race for the Presidency, nevertheless announced that he would remain a member of the Republican party. However, he then set out not only to remove his name from the ballots in those states which would hold Republican presidential primaries in the succeeding months, but also to seek ballot position as an independent candidate. He made this decision to switch to an independent candidacy late enough in the primary elections campaign so that he was able to remove his name from the Republican ballot in only five states (including Ohio). His name remained on the Republican ballot in twelve states and the District of Columbia.

In Ohio, respondent's "independent" campaign took the form of a petition drive, undertaken between May 10, 1980 and May 15, 1980, during which time his coordinators, nearly half of whom had previously served his Republican campaign in organizational capacities, gathered approximately 16,000 signatures in 86 of Ohio's 88 counties. The petitioner herein refused to accept respondent's petitions since they were not filed on or before March 20, 1980, the time limit set by Ohio Revised Code § 3513.257.

REASONS FOR GRANTING THE WRIT

1. This Case Presents Issues Of Imperative Public Importance Requiring Prompt And Conclusive Disposition By This Court Prior To Judgment In The Court Of Appeals.

The instant case presents an issue of the utmost public importance in that its resolution may directly and significantly affect the election, on November 4, 1980, of the next President of the United States. As the District Court correctly recognized, Ohio will on that day award to one candidate its slate of presidential electors which is, in size, the sixth largest in this country. By reason of the 25 votes it is accorded in the Electoral College, Ohio has the potential for directly affecting the ultimate selection of the President. In any close election, Ohio's 25 electoral votes will be extremely significant in determining who is selected as President. The outcome of the presidential election in Ohio may in turn be affected by the presence or absence on the ballot of respondent, a candidate with substantial support as recognized by the District Court. Moreover, respondent is currently presenting similar constitutional challenges to filing deadlines in Maryland, Maine, Kentucky and New Mexico. Therefore, the resolution of the instant case may well irrevocably determine the outcome of the 1980 presidential election and thus touch the life of every citizen of the United States.

This case presents ideal circumstances for this Court to exercise its power to review a case by writ of certiorari "before . . . rendition of judgment" in the court of appeals, 28 U.S.C. § 1254(1). Petitioner is permitted to apply for a writ of certiorari at any time before judgment is rendered by the court of appeals, even at a time only days after the case is docketed in the court of appeals. 28 U.S.C. § 2101(e); *United States v. United Mine Workers*, 330 U.S. 258 (1947). Under such circumstances, a writ will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in the court," Rule 18, Rules of the Supreme Court.

It is appropriate to grant the writ pursuant to Rule 18 upon a showing of the "public importance of issues presented and the need for their prompt resolution," *United States v. Nixon*, 418

U.S. 683, 687 (1974). The public importance of the issue presented by this case is equal to that in *United States v. Nixon.* Both cases involve issues which bear directly upon the office of President. In *Nixon,* at issue was the disclosure of materials prepared by that office, the nature of which ultimately had enormous impact upon the continuation in office of the President. In this case, the presence or absence of respondent's name upon the Ohio ballot for President may well determine which candidate is to receive Ohio's votes in the Electoral College, and that in turn may well determine who is to hold the office of President over the next four years.

Nor can one imagine a case more in need of prompt resolution. Should respondent's name remain on the Ohio presidential ballot on November 4, 1980, pursuant to the District Court's injunction, while appellate review proceeds, the validity of the election results could later be called into question should petitioner prevail and it become apparent that the votes of Ohio's presidential electors were determinative in the selection of the President. If respondent attracts the 23 to 44 percent of the vote which the District Court found him to be receiving according to current polls (A.39), it is obvious that his presence on the ballot in Ohio would call into serious question the election results in this state (and, consequently, the nation) should it later be determined that he was improperly allowed on the ballot. There is certainly imperative public interest in resolving the legal issues raised by this case in advance of the election so as to foreclose later challenges to election results which would create uncertainty as to who has been elected President in this time of national stress on both the domestic and foreign scenes.

Moreover, it would not appear possible to obtain review of the legal issues presented by this case by both the Court of Appeals and this Court prior to that point in time in October after which it is too late to make ballot changes (see petitioner's Motion to Expedite filed herewith). It is unlikely that the losing party in the Court of Appeals will not seek review of the matter in this Court, and, indeed, petitioner would have an appeal as of right, 28 U.S.C. § 1254(2). It is certainly desirable that the highest court of this nation put to rest a question bearing directly on the integrity of the presidential selection process.

The central issue in this case is simple. As set forth *infra,* the District Court did not correctly apply the law as announced by this Court to its adjudication of the constitutionality of the deadline imposed by Ohio upon independent presidential candidates for the filing of nominating petitions, and the District Court's determination is, therefore, in patent conflict with this Court's decisions. The instant case is thus brought well within the requirements for granting a writ of certiorari, Rules 17.1(c) and 17.2, Rules of the Supreme Court. This Court's granting of a writ of certiorari would bring before it a fully developed controversy in which the facts are unchallenged and where only the ultimate legal issue is left for decision. Where, as here, the issue is so clearly defined and its resolution is so urgently needed, the issuance of a writ of certiorari is not only necessary but totally consistent with this Court's role as the final arbiter of major constitutional disputes.

2. The District Court's Determination That The State Statute Constituted A *Per Se* Severe Burden Upon The Respondents' First Amendment Rights, Requiring A Showing Of Compelling State Interests In Justification, Is In Conflict With The Decisions Of This Court In *Storer v. Brown* And *Mandel v. Bradley.*

The District Court was called upon to determine, in the first instance, whether the filing deadline statute here in issue constituted such a severe burden upon the First Amendment rights of the respondents that it had to be justified by compelling state interests. The respondents had alleged that the imposition of the March 20, 1980, filing deadline upon respondent constituted an abridgment of their First Amendment rights to advocate political preferences, to associate for the purposes of such advocacy, to run as an independent presidential candidate or as an elector pledged thereto, and to vote for such an independent presidential candidate or his electors.

The District Court found (A.36) that the statute did "abridge fundamental rights of the [respondents]" and that the law "burden[ed] these plaintiffs' rights of expression and association secured by the First Amendment." The District Court's flat assertion that the imposition of a March 20, 1980, filing deadline

"*substantially abridges* the constitutional rights of association of Anderson and his supporters and the fundamental right to vote of his supporters" (emphasis added) (A.63) stands alone, absolutely lacking any articulated factual basis for a finding of substantiality. Thus, the District Court leaped right to a consideration of whether Ohio Revised Code § 3513.257 was justified by any compelling state interest without conducting any review of the evidence offered to show that the effect of the statute upon First Amendment rights was negligible. For example, the District Court made no findings concerning the history of independent candidates qualifying for the Ohio ballot despite evidence in the Joint Stipulation of Fact showing the ease with which such candidates have qualified in Ohio. The District Court's consideration of the filing deadline as a *per se* severe burden upon First Amendment rights is patently inconsistent with this Court's earlier opinions in *Storer v. Brown,* 415 U.S. 724 (1974) and *Mandel v. Bradley,* 432 U.S. 173 (1977).

In *Storer* and *Mandel,* this Court set forth an analytic framework for the resolution of challenges to ballot access statutes which were based on alleged violations of rights secured to the people under the First Amendment. The first of these cases, *Storer,* considered two separate challenges to the California Elections Code. One concerned the disaffiliation requirements which barred the independent candidacy of a person who had been affiliated with a "qualified political party" within the immediately preceding year. The action was brought by two persons seeking to stand for election as independent candidates for Congress who had been affiliated with a political party within the preceding year. This Court turned to its earlier decision in *Williams v. Rhodes,* 393 U.S. 23 (1968), and adopted therefrom the standard that such a requirement, in that it "*severely burdened* the right to associate for political purposes . . . had to be justified by *compelling state interests.*" *Storer,* 415 U.S. at 729 (emphasis added). Clearly, the message of this first branch of *Storer* was that a ballot access restriction which resulted from the fact of prior activity undertaken under the aegis of the First Amendment (*i.e.,* association with a political party) constituted a burden on those protected activities, the *severity* of which was *self-evident.* Therefore, it had to be justified by a compelling state interest.

The second branch of *Storer* presented the question of whether a set of petition signature requirements, which, this Court estimated, would operate to require the filing of 325,000 signatures by an independent candidate for the Presidency, imposed an impermissible burden upon ballot access. This Court declined to apply in the first instance the compelling state interest test it had set forth in the first part of the *Storer* opinion because the severity of the burden imposed by the statute could not be determined without further factual inquiry. This Court announced that, in such cases, it was necessary to "inquire as to the *nature, extent and likely impact* of the California requirements." 415 U.S. at 738 (emphasis added).

Therefore, according to *Storer,* the simple fact that a statute *affects* access to a ballot is an insufficient basis for a finding of *per se* unconstitutionality in the absence of a showing of compelling state interests. Second, this Court has classified ballot access statutes into two categories: those which, like the California disaffiliation statute, appear to impose a severe burden, the nature of which is self-evident from the operation of the statute; and those which, like the California petition signature requirements, cannot be said to impose a severe burden in the absence of an evidentiary inquiry directed at determining how the statute operates in fact. With respect to the latter category, the Court prescribed the following test for measuring the severity of the burden upon constitutional rights, 415 U.S. at 742:

> Third, once the number of signatures required in the 24-day period is ascertained, along with the total pool from which they may be drawn, *there will arise the inevitable question for judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?* Past experience will be a helpful, if not always unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. [Emphasis added.]

The Court applied this test to an election filing deadline in *Mandel.* The plaintiff, who sought to run as an independent

candidate for the U.S. Senate, successfully challenged in the District Court a Maryland statute requiring such candidates to file petitions bearing signatures of three percent of the registered voters on a date 70 days in advance of the state's primary election, *i.e.*, on March 8, 1976. Having found that none of the interests asserted by the defendant state in support of its statute were sufficiently compelling to justify the filing date, the trial court then found that the statute imposed an unconstitutional burden on the plaintiff's "right to become an independent candidate and on the rights of the other plaintiffs to exercise their franchise to vote" without any analysis directed at determining whether a reasonably diligent candidate could have complied with Maryland's law. *Bradley v. Mandel,* No. T 76-638, at p. 15 (D. Md. 1976) (a copy of the unreported opinion is included at A.96). The trial court held that it was bound by this Court's summary affirmance of a somewhat similar case. *See Tucker v. Salera,* 424 U.S. 959 (1976), *affirming Salera v. Tucker,* 399 F.Supp. 1258 (E.D. Pa. 1975).

This Court reversed and remanded; it found that the District Court had improperly relied on its summary disposition in *Tucker v. Salera* and reaffirmed the applicability of the test it first articulated in *Storer,* 432 U.S. at 177:

> Because of its preoccupation with *Salera,* the District Court failed to undertake an independent examination of the merits. The appropriate inquiry was set forth in *Storer v. Brown, supra,* 415 U.S., at 742:
>
> > [I]n the context of [Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? . . .

This Court went on to chastise the District Court for failing to make findings of fact concerning the difficulty of obtaining signatures before the filing deadline, for failing to consider the impact that other, perhaps more moderating parts of the statute might have in alleviating any burden created by the challenged statute, and for failing to consider the history of independent candidates qualifying for the Maryland ballot. The Court said, in

this regard, that "the District Court's assumption that the filing deadline by itself was *per se* illegal . . . resulted in a failure to apply the constitutional standards announced in *Storer* to the statutory provisions here at issue." 432 U.S. at 178 (footnote omitted).

When the District Court's decision in this case is measured against the law established by this Court in *Storer* and *Mandel,* the conclusion is inescapable that the District Court committed error identical to that of the trial court in *Mandel.* The court below disregarded this Court's statement that there can be no assumption in a filing deadline case that such a deadline is *per se* severely burdensome upon constitutional rights. The District Court's discussion of the First Amendment issues discloses no basis for this finding of severe burden. Rather, the District Court seems to be reasoning that since the filing deadline statute prevented the *particular candidate,* respondent Anderson, from qualifying for the ballot, the statute must *ipso facto* severely burden respondents' First Amendment rights. Having failed to provide any factual setting for this conclusion of law, the District Court thus clearly failed to undertake the *Storer* analysis which this Court announced, in *Mandel,* to be applicable to filing deadline challenges. Under the District Court's analysis, the mere fact of *effect* on a candidacy would seem sufficient to require the state to justify the statute by demonstrating compelling state interests; yet, the *effect* of the Maryland statute was to prohibit the candidacy involved in *Mandel,* and this Court did not find that to be grounds for finding the filing deadline *per se* illegal.

The District Court chose not to apply the *Mandel* test to its First Amendment analysis for several reasons. Most significantly, it considered the *Mandel* test *only* in connection with the Equal Protection issue (A.46) although petitioner certainly did not argue for any such limitation. Moreover, *Mandel* itself is clearly a First Amendment case, not an Equal Protection case, *Mandel,* 432 U.S. at 174. Second, the District Court misunderstood petitioner to be arguing that *Storer* and *Mandel* "eschew the application of a compelling interest standard of review" and propound "a new standard of review in ballot access cases" (A.47, 48). Petitioner argued instead that the "reasonably diligent independent candidate" test established by these cases is to

be utilized *prior to* employment of the compelling interest test where the severity of the burden imposed upon constitutional rights by a ballot access statute cannot be accurately determined without evidentiary review. That a filing deadline statute is to be judged within these parameters is established by *Mandel. If* the statute is found to "severely burden" constitutional rights, *then,* and only then, must it be justified by compelling state interests. *Williams v. Rhodes; Storer,* 415 U.S. at 729.

Third, the District Court stated that the "reasonably diligent independent candidate" test need only be applied where facts must be determined, and that that need not be done in this case because respondents do not challenge Ohio's signature requirements and respondent was "reasonably diligent" once he decided to run as an independent (A.50). However, the clear implication of *Mandel* is that "diligence" includes making one's decision to run for office before March 8. Otherwise, there would have been no reason for a remand in that case. If the deadline were in fact *per se* unconstitutional simply because an early decision were required, this Court would simply have affirmed the trial court's finding of unconstitutionality. Moreover, the plaintiff in *Mandel* did challenge the "remoteness" of the filing deadline (A.99), and the District Court dealt with the issue as a "remoteness" issue (A.101, 103-4). Neither the District Court in that case nor this Court discussed the issues in terms of the signature requirement and its relation to Maryland's interest in a candidate showing community support, as the District Court below suggests (A.50 n.7). At least one other district court has since read *Mandel* to require that the reasonably diligent candidate make up his mind to run well in advance of a filing deadline rather than simply act "diligently" once he has made up his mind, *Rock v. Bryant,* 459 F.Supp. 64 (E.D. Ark. 1978), *aff'd,* 590 F.2d 340 (8th Cir. 1978).

As a consequence of its failure to apply the *Mandel* test, the District Court *assumed* the filing statute to be severely burdensome upon constitutional rights and thus required that it be justified by compelling state interests in order to sustain challenge. Had the District Court applied the *Mandel* test, it would have had to find that the overall impact of Ohio's ballot access statutes was lenient in that they liberally allowed access by independent candi-

dates. Under such circumstances, the District Court's inquiry need have proceeded no further since a state need justify a ballot access statute regulating presidential candidates by showing compelling state interests *only* if constitutional rights are severely burdened. Article II, § 1, Cl. 2, of the Constitution provides broad authority to state legislatures to regulate the manner of selection of presidential electors, and state statutes so directed need be separately justified by a showing of compelling state interests only if *other* provisions of the Constitution are burdened. *Williams v. Rhodes,* 393 U.S. at 29. Thus, it was error for the District Court to have reached the issue of compelling state interests in this case.

While ignoring *Mandel* in its consideration of the standard of review for First Amendment purposes, the District Court instead relied primarily upon *Kusper v. Pontikes,* 414 U.S. 51 (1973), for the proposition that the only issue was the presence or absence of compelling state interests justifying Ohio's filing deadline (A.40). That case invalidated on First Amendment grounds an Illinois statute which prohibited a voter from voting in a party primary if he had voted within the preceding 23 months in another party's primary. This had the effect of preventing voters from participating each year in the party primary of their choice since a voter would have to forego voting in at least one primary election in order to switch parties. This Court noted that there could be "little doubt that [the statute] substantially restricts an Illinois voter's freedom to change his political party affiliation." 414 U.S. at 57. Where there is such "little doubt," it is, of course, proper to look to compelling state interests to justify the statute. However, *Mandel* teaches us that there *is* doubt as to the effect on First Amendment rights of a March filing deadline for candidates. Even in the absence of *Mandel,* one could hardly contend that requiring a candidate to choose the method by which he will seek election seven months before the election is analogous to requiring the voter not to participate at all in a given primary election if he wishes to switch parties. This case involves a shorter time period than that upheld by this Court in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), sustaining a statute requiring a voter to decide eleven months before a primary election if he wished to switch parties.

The District Court appears to rely in part (A.36) on this Court's decision in *Illinois State Board v. Socialist Workers' Party*, 440 U.S. 173 (1979), a case dealing with signature burdens, for the startling proposition that a filing deadline can itself be a *per se* burden upon First Amendment rights. The District Court has misinterpreted *Illinois State Board*, neglecting as it did to distinguish between the nature of the claim at issue therein, a challenge to a statute solely on Fourteenth Amendment equal protection grounds, and the First Amendment claims of the plaintiffs herein. *Illinois State Board* involved application of a statute in such a manner as to require an independent candidate for Mayor of Chicago to secure more petition signatures for ballot position than would have been required of an independent candidate for statewide office. The discriminatory operation of the statute was thus clear and blatant, and it is for this reason that the Court looked to possible compelling state interests. There was no finding of a First Amendment violation, and the case is irrelevant for purposes of determining how one measures burdens upon First Amendment rights.*

The District Court adopts language from *Illinois State Board* condemning the tendency of "overbroad restrictions" to "jeopardize this [First Amendment] form of political expression" but again fails to find any facts which would support a legal conclusion that the statute here challenged is unconstitutional for overbreadth. Such a concept is meaningless unless framed against a factual setting that demonstrates how the operation of the statute is in fact overbroad.

Finally, the District Court (A.38) bases its finding of a First Amendment violation in part upon its perception that Ohio's statute has an extraterritorial impact. In this regard, the District Court found that if respondent were denied ballot position in Ohio, and thus denied an opportunity to compete for Ohio's 25 electoral votes, the value of the votes sought to be cast for respondent by persons in other states, including respondent Eisenstat, would be diluted. The District Court thus found, in essence, that

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* The Court did not reach the First Amendment issues involving a filing deadline because the lower court postponed decision on these, and a subsequent settlement eliminated the issue. 440 U.S. at 179-180.

there is a requirement that ballot access statutes regulating presidential elections be uniform, among and between *all* the states, if such "dilution" is to be prevented. Certainly, insofar as any one state imposes requirements on candidates for national office which are in the slightest way different from those imposed elsewhere, the candidate qualifying in one state, but not the other, and his supporters, can always claim dilution of the value of their votes in the state in which the candidate qualifies. Yet, that such cannot be the law is evidenced by Article II, § 1, Cl. 2, of the Constitution. Its delegation to the several states of the power to appoint their electors, and to choose the manner by which the selection shall be made, is eviscerated if the District Court's view prevails. Such a delegation of authority to the states certainly implies a certain amount of diversity in regulation. *See Storer,* 415 U.S. at 730.

Not only did the District Court fail to apply the test mandated by this Court but its rule of *per se* unconstitutionality leads inexorably to the untenable conclusion that all state ballot access statutes regulating the presidential election must be uniform, a result which is certainly inconsistent with Article II, § 1, Cl. 2, of the Constitution. Because this view patently conflicts with the law as announced by this Court in *Storer* and *Mandel,* the issuance of a writ of certiorari is essential to a proper determination of the issues.

3. The District Court's Determination That Invidious Discrimination In Violation Of The Equal Protection Clause Is Created By Requiring Independent Candidates For President To File Nominating Petitions On March 20, 1980, Conflicts With Several Decisions Of This Court.

The District Court found that Ohio Revised Code § 3513.257 works an invidious discrimination against independent candidates in favor of partisan candidates, thus ruling that these candidates were comparable for purposes of analysis under the Equal Protection Clause of the Fourteenth Amendment. This holding conflicts with this Court's previous rulings that political party and independent candidate approaches are entirely different, *Storer,* 415 U.S. at 745; that mere statutory classifications do not violate the Equal Protection Clause unless they constitute "in-

vidious discrimination," *American Party v. White*, 415 U.S. 767, 781 (1974), *quoting Ferguson v. Skrupa*, 372 U.S. 726 (1963); and that a state is not guilty of such invidious discrimination simply because it recognizes the differences between different kinds of candidacies and provides different routes to the election ballot, *Jenness v. Fortson*, 403 U.S. 431 (1970). The District Court itself said: "One cannot compare for all purposes the independent candidate with the candidate who conducts his campaign within the party system; nor can one compare him with a party" (A.45), but nonetheless held that there was sufficient similarity in the types of candidacies so that the claimed disparate treatment accorded them by Ohio law "may well be suspect under the Equal Protection Clause" (A.45).

In fact, independent candidacies and partisan candidacies are in salient ways so completely dissimilar that their comparison for the purposes of determining the existence of a violation of the guarantee of equal protection is nearly meaningless. The state is obligated to recognize and account for these differences in its regulatory scheme; the "grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. at 442.

There are two clear routes to the presidential ballot in Ohio which *persons* may seek. Persons wishing to appear as independent candidates on the general election ballot must file declarations of candidacy and petitions bearing the signatures of at least 5,000 eligible electors on March 20, 1980, and such signatures may be gathered from all registered voters notwithstanding party affiliation, geographical distribution or intention to vote in the upcoming party primary, Ohio Revised Code § 3513.257. Similarly, persons wishing to vie for Ohio's delegates to the national conventions of political parties must file by the same date written consent to the declarations of candidacy of their delegates, slates of delegates, and nominating petitions for delegates bearing 1,000 signatures secured statewide and additional signatures from Congressional Districts, Ohio Revised Code §§ 3513.05 and 3513.12. The numerical difference reflects the more stringent requirements imposed on the latter category of petitions, including that the signers be members of the political party within which the person wishes to compete, and that geographical distribution

requirements be met. Any person may avail himself or herself of either of these two routes to the general election ballot, but all persons wishing to do so must have committed themselves to that candidacy on or before March 20, 1980.

Nevertheless, the District Court found unlawful discrimination because "the statutes do permit a partisan candidate to receive the nomination of his party and thereby appear on the Ohio general election ballot in November, without previously having had to file [a declaration of candidacy and nominating petitions] with the Secretary of State" (A.43). Stating that it would disregard the likelihood of such an occurrence, the District Court concluded that the spectre of this partisan candidate being nominated by a political party and therefore appearing on the general election ballot without having declared candidacy on March 20, 1980, and sought delegate support in the primary election was sufficient reason to find that independent candidates are the victims of invidious discrimination because they must have declared their candidacies by March 20, 1980.

What the District Court failed to discern, however, was that this power of a political party to nominate a candidate for inclusion on the general election ballot is one which was *earned* on a date well in advance of March 20, 1980, and in that sense owned by the political parties themselves, by virtue of their having continued to meet the requirements of Ohio Revised Code Chapter 3517. In exchange for this privilege, the political parties must poll a certain percentage of the votes cast for either the governor or all presidential nominees in the last preceding election. Ohio Revised Code § 3517.01(A). Parties which fail to win five percent of the total vote cast automatically cease to be political parties under state law, lose their rights to certify the names of their nominees for inclusion on the general election ballot and can only reestablish their ballot position by the filing of petitions bearing signatures of one percent of the total vote for governor or presidential electors in the last succeeding general election. Moreover, the timeliness requirements are such that a new political party which seeks to be awarded ballot position for its nominees must organize at least 120 days in advance of the next succeeding primary election. Parties seeking ballot position for their nominees on the general election ballot must therefore have qualified as "political

parties" under state law at least 45 days *before* independent candidates are required to do anything at all.

Assuming it is possible to make any comparison between the two different routes to the presidential ballot in Ohio, the proper comparison for equal protection purposes is one drawn between independent candidates and organizations qualifying as "political parties" under state law. Because the ultimate goal of any campaign for public office is inclusion on the general election ballot in November, the classes to be compared for equal protection purposes must necessarily be those which have such ballot access within their power. Beyond doubt, there are only two holders of such power of access: independent candidates, who are guaranteed ballot position through simple compliance with Ohio Revised Code § 3513.257; and political parties that remain in compliance with Ohio Revised Code Chapter 3517, thereby earning the right to certify the name of the party nominee. If either of these classes is discriminated against, it is the political parties who are required to organize sooner, and to show a greater indication of community support by polling five percent of the vote at either gubernatorial or presidential elections.

The difficulty of making any comparisons concerning different routes to the ballot is underscored in *Storer* where this Court stated that "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other", 415 U.S. at 745. The District Court tended to ignore the difficulty; furthermore, the District Court did not heed the admonition that "[A State is not] guilty of invidious discrimination in recognizing these differences [between different types of political organizations] and providing different routes to the printed ballot", *Jenness v. Fortson*, 403 U.S. at 441-2.

The District Court's obvious error was that while it focussed on the last dates upon which steps may be taken to have the names of the two types of candidates simply *placed* upon the ballot, it did not account for the timing of the actual *awarding* of ballot position. Independent candidates were awarded ballot position if they were in compliance with Ohio Revised Code § 3513.257 on March 20, 1980. Political parties were awarded ballot position if they had met the requirements of Ohio Revised

Code Chapter 3517 on or before *February 14, 1980,* and they must thereafter certify the names of their nominees to the Secretary of State at varying times ranging up until late August, 1980. Yet, the certification of such names is far different from "qualifying" for ballot position; the last point in time at which a political party can qualify for ballot position is February 14, 1980, whereas any person may qualify as late as March 20, 1980, by running without party affiliation.

The District Court states that one indication of discrimination against independent candidates for President is that they must decide whether to declare their candidacies at a time before campaign issues and the positions of the candidates are known and before the party platforms are known (A.43-4), from which it can be implied that the District Court would find discriminatory any filing deadline which fell in advance of the national party conventions. However, if the current statutory scheme discriminates against independent candidates, one which allowed independent candidates to file for ballot position when the national party conventions are held would work an equal discrimination upon those party candidates who, the District Court feels, are free to make their decisions to seek the nomination after the primaries. This is because the independent who files his nominating petitions in August after the issues have crystallized and the party platform is known would have a much easier time qualifying for the general election ballot than the party candidate who makes the same decision to seek the nomination for the first time at the convention, since the independent must simply seek petition signatures while the party candidate must overcome the handicap of having most of the delegates already awarded to other party candidates at the primaries. That no manipulation of relative filing deadlines eliminates the supposed discrimination seen by the District Court indicates that the classes involved are so dissimilar as to defy meaningful comparison. *Jenness v. Fortson; Storer.*

Therefore, if viewed from the perspective of qualification for ballot position in the general election, there is no discrimination against independent candidates and, in fact, the deadline in Ohio Revised Code § 3513.257, falling as it does at least 45 days after the final date for qualification by political parties, may actually

discriminate *in favor* of independent candidates. However, the identical filing deadlines imposed on *persons* who wish to launch political campaigns for President in this state, seeking thereby either delegates to the political party conventions or votes in the general election, also prevent the imposition of any discrimination among and between those potential candidates.* The significance of eliminating discrimination between these persons was highlighted by Mr. Justice Stevens, dissenting in *Mandel,* as an indication of his concern over the seemingly disparate filing requirements which candidates had to satisfy. Noting that the filing requirements imposed on independent candidates were far more burdensome than those which party candidates had to meet, Mr. Justice Stevens stated, 432 U.S. at 181:

> Moreover, it [the disparate treatment] is potentially a matter of great significance. The decision to become a candidate may be prompted by a sudden, unanticipated event of great national or local importance. If such an event should occur on the 71st day [the day before the filing deadline] before a primary, national party members could make a timely decision to run but independents could not.
>
> The statute should be evenhanded in its impact on the timing of the most important decision any candidate must make. . . .

Such disparate treatment is simply not present under the Ohio statutes; although the signature burdens are different, with the partisan candidate required to obtain 1,000 signatures statewide in addition to 150 from each of 23 Congressional Districts, Ohio Revised Code §§ 3513.05 and 3513.12, in comparison with the 5,000 which an independent candidate must collect, the restrictions placed on the partisan candidate are such that they will restrict the pool from which such signatures can be drawn. As this Court itself recognized in *Storer*, the size of the pool of eligible signers is relevant in determining the actual extent of the burden imposed on a candidate.

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* In fact, the discrimination is again in favor of the independent candidate, since he may fully qualify for the general election ballot by filing his nominating petitions on March 20, 1980, whereas the partisan candidate must not only file nominating petitions for his delegate slate but go on to win the nomination of his party at the national convention.

Whether the comparison is made between persons or between statutory methods of being awarded ballot position, it is incontrovertible that independent candidates are not subjected to any discrimination at all. All persons wishing to campaign as a way of garnering support for their candidacies must signify their intention to do so, and their chosen ballot route, by the filing of declarations of candidacy and signature petitions on the same date. Similarly, qualification for positions on the general election ballot in November can be obtained in one of only two ways: by declaration of an independent candidacy on or before March 20, 1980, or by compliance on or before February 14, 1980, with the requirements upon which the status of "political party" is premised.

No *person* who is not an independent candidate is ever able to qualify for ballot position. If such a person chooses not to mount an independent candidacy on or before March 20, 1980, he may be accorded ballot position only if he succeeds in capturing the nomination of a political party which has earned ballot position by virtue of having fully complied with Ohio Revised Code Chapter 3517 on or before February 14, 1980.* Because the District Court based its finding of an equal protection violation on an erroneous alignment of the classes, and failed to recognize the differences between different kinds of candidacies and the state's concomitant duty to account for these differences in its regulatory scheme, its holding is in conflict with the opinions of the Court in *Jenness v. Fortson, American Party v. White,* and *Storer.*

4. The District Court's Determination That The State Statute Did Not Serve The Compelling State Interest Of Preservation Of Political Stability Is In Conflict With The Decision Of This Court In *Storer v. Brown.*

The District Court found that no compelling state interests were served by the filing deadline statute, and therefore declared it unconstitutional. It so found notwithstanding the fact that one

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* It is important to note that respondent was not denied the opportunity after March 20, 1980, to have his name placed upon the Ohio presidential ballot. He needed only to capture the nomination of the Republican or Democratic Party. In that respect, he is being treated no differently than

of the interests clearly served by that statute is the preservation of political stability, an interest which this Court recognized as a compelling interest in *Storer*. Because the filing deadline statute in fact preserves political stability and the integrity of Ohio's primary election system, interests expressly sanctioned by this Court in *Storer*, the District Court's holding to the contrary simply conflicts with the law as set forth by this Court.

This Court found in *Storer* that primary elections were "an integral part of the entire election process," and the "initial stage in a two-stage process by which the people choose their public officers." 415 U.S. at 735. This Court then stated, 415 U.S. at 735-36:

> It [the direct party primary] functions to winnow out and finally reject all but the chosen candidates. The *State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences.* The general election ballot is reserved for major struggles; *it is not a forum for continuing intraparty feuds. . . .*
>
> Section 6830(d) (Supp. 1974) [the disaffiliation statute] carries very similar credentials. *It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique or personal quarrel. . . .*
>
> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, *but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.* Nor do we have reason for concluding that the device California chose, . . . was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated

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Ronald Reagan, Edward Kennedy, or Jimmy Carter, none of whom could be placed on the ballot after March 20, 1980, without party designation but all of whom could seek, as could respondent, to run as "independents" prior to that date.

> in Rosario [v. Rockefeller, 410 U.S. 752 (1973)], the Constitution does not require the State to choose ineffectual means to achieve its aim. *To conclude otherwise might sacrifice the political stability of the system of the State with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot.*
>
> We conclude that § 6830(d) . . . is not unconstitutional. . . . [Emphasis added.]

The District Court attempted to avoid the clear impact of *Storer's* holding that states may act to ensure the integrity of their primary elections system by preventing candidates not succeeding in party primary campaigns from filing anew as independents and using the general election ballot as a "forum for continuing intraparty feuds." First, the District Court concluded that *Storer* would control only where the actual statute being challenged was a "disaffiliation" statute, since that was the factual setting of the first branch of *Storer*, and found that Ohio's statute on its face gave no indication that it was such (A.54). The District Court viewed disaffiliation as requiring that any person seeking access to any of the state's electoral routes, *e.g.*, by filing petitions as an independent candidate, demonstrate his commitment to that route by severing all connections with other political parties. The California statute was obviously focussed on the titular party membership or participation, if any, of persons seeking ballot access.

However, petitioner does not claim that the filing statute here challenged is, in that sense, parallel to the California statute. To the contrary, petitioner's central contention is that the filing deadline statute serves the *same interests* as the disaffiliation statute upheld in *Storer* but by a different method, namely, simultaneous filing deadlines for independent candidates and party primary candidates. Ohio Revised Code §§ 3513.05 and 3513.257. By the establishment of simultaneous filing deadlines for persons seeking entry into the primary election process and persons seeking to run as independent candidates, participation in *both* processes (as attempted by respondent) is clearly foreclosed. The petitioner is not attempting to regulate the political party affiliation of such persons, but only seeks to guarantee that

the different means of access to the ballot—either through political parties or through independent campaigns—remain separate and mutually exclusive. This effect is apparent on the face of the statute despite the District Court's assertion to the contrary.

The District Court's misapprehension of the effect of *Storer's* holding in this regard is evident, for the District Court says (A.54): "The [petitioner] claims that Anderson would have been able to meet the March 20 deadline if only he had decided at some point earlier than March 20 *to disaffiliate, and cease his activities in the Republican state primaries* (emphasis added)." Yet, the petitioner has never suggested that an independent candidate in Ohio has to disaffiliate or that activity undertaken by an individual candidate with respect to primaries held in other states would foreclose his initiation of an independent candidacy in this state, and the interest which Ohio seeks to serve by use of simultaneous filing deadlines for all persons seeking to compete for the same office is the integrity of *this* state's primary campaigns and elections.

The District Court characterized the filing date selected by the state as simply "arbitrary" (A.56). However, it is hardly arbitrary when it is the *same* date required for filing by party primary candidates and thus prevents a faltering primary election candidate from abandoning his primary election campaign and carrying his differences with fellow party members to the general election ballot by running as an independent. This Court's decision in *Storer* recognizes the state's interest in preserving the integrity of not only the primary election, but of the primary *campaign* itself by allowing states to prevent use of the general election ballot for the continuation of intraparty feuds. Respondent Anderson sought to do exactly that by terminating his Republican primary election campaign in Ohio and seeking to run as an independent. This would not only have allowed him to continue raising in the general election the issues he had asserted against his fellow Republican opponents in the primary, but would also promote "splintered parties" by pulling away Republican Party organizers to work in his "independent" campaign. This in fact happened (see Statement of Case). *See Storer,* 415 U.S. at 736.

The District Court's second objection to the relevance of *Storer* is that this particular controversy arose with respect to a presidential election (A.55). This is a curious objection in light of

this Court's having declined to so limit its opinion in *Storer*. In its treatment of the persons seeking to run as independent candidates for the Presidency and Vice-Presidency, this Court clearly assumed that the state interests articulated in the first part of its opinion with respect to Congressional candidates—interests which allowed the state to require compliance with disaffiliation statutes in order to preserve the integrity of the primary campaign and election—were equally compelling where the offices sought were national ones. That this is the case is demonstrated by this Court's comments concerning the "community support" interest served by the imposition of signature requirements, *Storer*, 415 U.S. at 743:

> As a preliminary matter, it would appear that the State, having disqualified defeated candidates and recent defectors, has in large part achieved its major purpose of *providing and protecting an effective direct primary system*. . . . [Emphasis added.]

This interest in assuring the integrity of the primary election process, and the fact that it is equally valid in the context of a presidential campaign, is even more clearly acknowledged in this Court's discussion of the persons who, under California law, would be eligible to sign the petitions circulated by the independent presidential and vice-presidential candidates. Although the entire matter was remanded for additional evidentiary findings, this Court did state, 415 U.S. at 740-41:

> First, we have no doubt about the validity of disqualifying from signing an independent candidate's petition all those registered voters who voted a partisan ballot in the primary, although they did not vote for the office sought by the independent. We have considered this matter at greater length in American Party of Texas v. White, [citations omitted] and we merely repeat here *that a State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures,* the partisan or the non-partisan, for nominating candidates for the general election ballot. [Emphasis added.]

This Court has thusly acknowledged that the integrity of the direct primary election process, a process which no doubt includes not only the election itself but also the campaign which precedes it, remains a vital state interest which is undiminished by the fact that the particular office sought is the Presidency.

Finally, the District Court (A.55) relied upon the fact that Ohio has a "disaffiliation" statute in Ohio Revised Code § 3513.04, which prohibits persons who have sought nomination at a primary election from becoming candidates at a general election by nominating petition, and that the parties stipulated it was inapplicable to respondent. However, it is difficult to understand how the conceded inapplicability of one statute can be construed to limit the application of another statute which clearly prohibits respondent's independent candidacy under circumstances contemplated by *Storer*, and the District Court cited no authority for such a proposition.

None of the three reasons put forth by the District Court for the inapplicability of *Storer* justifies the result reached. The decision clearly conflicts with *Storer,* and, therefore, a writ of certiorari should be granted.

5. The District Court's Refusal To Enter Judgment For Petitioner In Accordance With This Court's Summary Affirmance In *Sweetenham v. Rhodes* Conflicts With This Court's Holding In *Mandel v. Bradley* That Summary Affirmances Reject The Specific Challenges Presented In The Statement Of Jurisdiction Filed With This Court To Initiate An Appeal.

The District Court found that this Court's summary affirmance in *Sweetenham v. Rhodes,* decided together with *Socialist Labor Party v. Rhodes,* 318 F.Supp. 1262 (S.D. Ohio 1970) (three-judge court), *aff'd sub nom. Sweetenham v. Gilligan,* 409 U.S. 942 (1972), did not control the disposition of this case, notwithstanding that the issue as framed by the appellants therein in the Statement of Jurisdiction is identical to the issue determined by the District Court herein. The District Court's holding is therefore squarely in conflict with this Court's ruling in *Mandel.*

The plaintiff in *Sweetenham v. Rhodes,* an independent candidate for Governor of Ohio, contended that three separate statu-

tory requirements found in Ohio Revised Code §§ 3513.257 and 3513.258 were unconstitutional, and Judge Kinneary, writing for the three-judge court, agreed with the plaintiff as to the unconstitutionality of certain geographic distribution and percentage requirements imposed on signature petitions and enjoined their enforcement. However, the District Court rejected the plaintiff's contention that the filing deadline itself was unconstitutional and stated, 318 F.Supp. at 1273:

> The state has an interest in having persons who otherwise qualify for ballot position officially become candidates at a designated time prior to an election. *In addition, the state may reasonably require that all persons seeking elective office become officially declared candidates on or before a certain date preceding an election.* One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process. [Emphasis added.]

At the time *Sweetenham* was considered by the District Court, Ohio law required that nominating petitions be filed in 1970 by February 4. Thus, the District Court in *Sweetenham* in fact approved of a filing deadline set on a date well in advance of the March 20, 1980, deadline required by Ohio Revised Code § 3513.257 in the current year. That the constitutionality of the filing deadline was directly in issue in *Sweetenham* is obvious from the language of the Jurisdictional Statement filed therein (A.111):

> 2) Where a state has prescribed that independent candidates for political office must file their nominating petitions approximately nine months before the general election and where such requirement is not shown to be justified by any compelling state need, are the First and Fourteenth Amendments contravened?

The issue as framed in *Sweetenham* is clearly identical to that raised and disposed of by the District Court in the instant case, which found a violation of the respondents' First and Fourteenth Amendment rights after determining that the filing deadline statute served no compelling state interests. However, the District Court here concluded that the lower court's judgment in

Sweetenham did not in fact even reach the question of the constitutionality of the filing deadline itself, and that disposition of that question had been foreclosed because of "the failure of the challenging plaintiffs to allege a real and immediate injury presenting a case or controversy within Article III of the United States Constitution that would be capable of adjudication by the district court" (A.57 n.9).

The District Court, in concluding that no case or controversy had been presented to the three-judge court which decided *Sweetenham,* said, "Having failed even to tender a nominating petition, neither [plaintiffs] were in a position to place in issue a deadline regulating the time for filing those petitions" (A.57 n.9). Yet, the *Sweetenham* decision itself gives no indication that the District Court considered itself unable to dispose of the filing deadline challenge because of a lack of "case or controversy." Moreover, *Sweetenham* clearly presented the trial court with "conflicting contentions of the parties . . . [which] present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979), *citing Railway Mail Association v. Corsi,* 326 U.S. 88, 93 (1945). The plaintiff in *Sweetenham* demonstrated a realistic danger of sustaining a direct injury as a result of the operation and enforcement of the filing deadline statute, *see O'Shea v. Littleton,* 414 U.S. 488, 494 (1974), and thus presented to the District Court a real and substantial controversy admitting of specific relief, *see Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1937), not a request for an advisory opinion to be based upon a hypothetical set of facts.

That being the case, the District Court's decision conflicts with the holding of this Court that lower courts are bound by summary decisions of this Court "until such time as the Court informs [them] that [they] are not," *Hicks v. Miranda,* 422 U.S. 332, 345 (1975). The District Court's decision is also clearly at odds with this Court's holding in *Mandel,* for while there are limitations on the reach of summary affirmances, *see Edelman v. Jordan,* 415 U.S. 651 (1974), they do "without doubt *reject the specific challenges presented in the statement of jurisdiction* and do leave undisturbed the judgment appealed from," *Mandel,* 432 U.S. at 176 (1977) (emphasis added).

This Court's decision in *Mandel* contains a significant discussion of the precedential value of its summary affirmances. *Mandel* concerned the application by a district court in Maryland of this Court's holding in *Tucker v. Salera,* 424 U.S. 959 (1976), wherein this Court summarily affirmed a Pennsylvania district court decision. *See Salera v. Tucker,* 399 F.Supp. 1258 (E.D. Pa. 1975). The lower court in *Mandel* had held, after only a cursory examination of the relevant issues, that this Court's ruling in *Tucker v. Salera* controlled, without considering that the state statutory scheme invalidated in the Pennsylvania case contained features not found within the Maryland law. This Court said in that regard, *Mandel,* 432 U.S. at 176-177:

> Here, the District Court ruled that legally "*Salera* decides the issue before us, and as the latest expression of the Supreme Court, we are bound to follow it." [Citation omitted.] The precedential significance of the summary action in *Salera,* however, is to be assessed in light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case. There, in addition to the early filing date, signatures had to be gathered within a 21-day period. This limited time enormously increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate. [Footnote omitted.]
>
> This . . . is sufficient to distinguish *Salera* from the case now before us . . . . In short, *Salera* did not mandate the result reached by the District Court in this case.

This Court's disagreement with the use of its summary affirmance in *Tucker v. Salera* by the district court in Maryland is readily understood. Because the statutory schemes were different, and because the applicable *Storer* test includes an analysis of the overall impact of state ballot access requirements on the "reasonably diligent independent candidate," *Storer,* 415 U.S. at 742, this Court found that its summary affirmance in *Tucker v. Salera* could not be applied to invalidate the statutes of *another* state. Maryland's statutes were less stringent than the statutes at issue in the Pennsylvania case.

However, the problems faced by the Maryland court in its attempt to utilize the summary affirmance of the Pennsylvania

case for its precedential value are simply not present in the case at bar. The precise holding of *Sweetenham* on the question of the constitutionality of Ohio's filing deadline statute was that a deadline which occurred on *February 4, 1970,* was not unconstitutional. While a decision in a previous case which this Court summarily affirms may not control the result of subsequent parallel litigation where the restriction sought to be upheld in the later case is more stringent than that upheld in the earlier case, *see Kay v. Brown,* 424 F.Supp. 588 (S.D. Ohio 1976), surely the prior judicial approval of a *greater* restriction subsumes within it implicit approval of a lesser restriction of the same type. Because the deadline currently imposed by Ohio Revised Code § 3513.257 is more lenient than that found constitutional by the District Court in *Sweetenham,* the District Court should have granted judgment to petitioner.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court prior to the rendering of judgment on the appeal therefrom in the Sixth Circuit Court of Appeals.

Respectfully submitted,

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August , 1980

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Judgment

FILED
JOHN D. LYTER, CLERK
JUL 10 10 30 AM '80
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John B. Anderson, et al.,

v.

Case Number: C-2-80-400

Anthony J. Celebrezze, Jr.,

J U D G M E N T

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the motion for summary judgment of defendant Anthony J. Celebrezze, Jr., is DENIED: the motion for preliminary injunction of the plaintiffs is now moot and is therefore DENIED; and plaintiffs' motion for summary judgment is GRANTED. It is ADJUDGED and DECREED that R.C. 3513.257, as applied to plaintiffs Anderson and Hetrick, is violative of plaintiffs' rights to political association under the First and Fourteenth Amendments to the United States Constitution, and is violative of plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution. Judgment is entered for the plaintiffs. It is hereby ORDERED that the defendant Secretary of State accept and process the plaintiffs' petition and other documents as if timely filed under R.C. 3513.257. It is further ORDERED that the defendant cause Anderson's name to appear on the Ohio ballot in the November 4, 1980, presidential general election, if aside from R.C. 3513.257 he has otherwise met the requirements of Ohio's election laws.

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JUL 23 1980
ATTORNEY GENERAL'S OFFICE
CHIEF COUNSEL'S SECTION

Approved for Entry
United States District Judge

Dated at Columbus, Ohio this 17th day of July, 1980.

JOHN D. LYTER, CLERK

By:
Deputy Clerk

Opinion and Order of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-80-400

JOHN B. ANDERSON, et al.,

Plaintiffs,

v.

ANTHONY J. CELEBREZZE, JR.,

Defendant.

OPINION

Plaintiff John B. Anderson is an independent candidate for the office of President of the United States. He declared his independent candidacy on April 24, 1980. On May 16, seeking to place his name on the November ballot in Ohio, Anderson tendered to defendant Anthony J. Celebrezze, Jr., Secretary of State of Ohio, those documents required by Ohio law to effect Anderson's nomination as a candidate for that office. The defendant rejected Anderson's filing, citing as the sole ground therefor Anderson's failure to file by the deadline set by Ohio Revised Code (R.C.) § 3513.257. That deadline requires an independent to file his nomination papers 75 days before the primary election in June.

In this election year, the filing deadline falls on March 20, 1980, some 229 days prior to the general election. Upon the rejection of his nominating petition, plaintiff Anderson and three of his supporters filed this lawsuit seeking injunctive relief to place his name on the ballot as well as a declaration that R.C. 3513.257 operates to violate the constitutional rights of Anderson and of electors and voters supporting him in Ohio and across the nation.

Jurisdiction is invoked pursuant to Article II, § 1, Article VI, and the First, Fifth and Fourteenth Amendments of the Constitution of the United States; 28 U.S.C. §§ 1331, 1343(3), and 2201-02; and 42 U.S.C. § 1983.

The case is before the Court on the parties' cross-motions for summary judgment and on plaintiffs' motion for preliminary injunction. The parties have submitted this case on a lengthy stipulation of facts which is appended to this opinion. Following an expedited briefing schedule, the matter was argued to the Court on June 26, 1980. Because there appears to be no genuine issue as to any material fact, the Court finds this case appropriate for summary judgment. Fed. R. Civ. P. 56(c).

Upon careful consideration of the important issues here presented to it, the Court holds that R.C. 3513.257 imposes a substantial burden on plaintiffs' fundamental rights and is not justified by any compelling state interest. Accordingly, the Court concludes that the statute is unconstitutional and the defendant must accept plaintiffs' nominating petition and other documents for processing.[1]

Discussion of Law

Defendant Celebrezze concedes that the sole reason for rejecting Anderson's filing was that it was not tendered by March 20. Therefore, the sole statutory provision at issue in

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1 Having resolved below that the statute is unconstitutional under the First and Fourteenth Amendments, the Court does not reach plaintiffs' claims under the Supremacy Clause of Article VI of the United States Constitution.

this case is the first sentence of R.C. 3513.257[2] which establishes the time deadline for the filing of a declaration of candidacy and nominating petitions necessary to qualify an independent for candidacy.

This filing deadline has emerged virtually unscathed from the rather tumultuous course the Ohio election laws have taken since the Supreme Court subjected them to thorough examination in the landmark case of *Williams v. Rhodes,* 393 U.S. 23 (1968). In *Williams* the Court held that the Ohio electoral scheme, taken as a whole, burdened voting and associational rights, working an invidious discrimination in violation of the Equal Protection Clause.[3] The statutory scheme required an unusually high number of signatures (15% of the ballots cast in the last gubernatorial election), a highly structured state political organization, a primary election conforming to detailed and rigorous standards, and an early filing deadline. It made no provision for independents or for write-in candidates. Finding that the electoral scheme effectively excluded minor parties from the electoral process and operated to preserve the position of the two major parties

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2 This sentence reads:

> Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the first Tuesday after the first Monday in June [*i.e.*, the date of the primary election, *see* R.C. 3513.01] at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petitions provided in section 3513.261 of the Revised Code.

3 Mr. Justice Black's opinion for the Court was joined by three other justices. Mr. Justice Douglas joined in the opinion and concurred in the decision emphasizing that the First Amendment and the Due Process Clause of the Fourteenth Amendment provided an additional source of protection for plaintiffs' rights. Mr. Justice Harlan concurred in the result, stating in his view the decision should rest entirely on the basic right of political association assured by the First Amendment and the Due Process Clause of the Fourteenth Amendment. Mr. Justice Stewart, Mr. Justice White and Mr. Chief Justice Warren dissented.

as the only meaningful contenders on the Ohio ballot, the Court upheld a challenge by two minor parties seeking access to the presidential election ballot.

Since that time, Ohio has significantly lowered its signature requirement to 5,000, which in this election year amounts to about twelve one-hundredths of one percent of the vote in the last presidential contest. It now permits write-in votes for candidates filing a declaration of candidacy and a slate of presidential electors 20 days before the election. R.C. 3513.041. It permits independents to run for President and minor parties to qualify without primary elections.

Viewing the present statutory scheme as a whole it is arguable that these changes softened the restrictive impact of the filing deadline. In addition, the deadline itself has since been amended to fall later in the election year. In 1968 the filing date fell on February 7. *Williams v. Rhodes, supra,* 393 U.S. at 26. Thus the precise issue presented here, namely, whether the present Ohio filing deadline works an unconstitutional deprivation, was not decided by the Supreme Court in *Williams v. Rhodes.*

On the other hand, and notwithstanding the changes noted, the deadline remains substantially the same as the deadline forming part of the restrictive statutory scheme enacted between 1948 and 1952 after the Henry Wallace campaign in 1948, *see Socialist Labor Party v. Rhodes,* 318 F.Supp. 1262, 1269 and n.11 (S.D. Ohio 1970) (three-judge court); *Williams v. Rhodes, supra,* 393 U.S. at 47 n.9 (Harlan, J., concurring), and expressly included by the Supreme Court among the laws comprising the restrictive scheme it held unconstitutional in *Williams.* 393 U.S. at 27.

The First Amendment and Fundamental Rights Implicated by R.C. 3513.257

Ballot access jurisprudence has undergone considerable development in the 12 years since the Court decided *Williams v. Rhodes.* The appropriate starting point in this analysis is, therefore, the most recent Supreme Court opinion in the area

of ballot access laws, *Illinois Board v. Socialist Workers Party,* 440 U.S. 173 (1979). While that case dealt with a different type of restriction—signature requirements—than is at issue here, it summarizes succinctly the fundamental rights implicated by restrictions on ballot access:

> Restrictions on access to the ballot burden two distinct and fundamental rights, "the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." [Citing *Williams v. Rhodes,* 393 U.S. 23 (1968)]. The freedom to associate as a political party, a right we have recognized as fundamental, see 393 U.S. at 30-31, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish,* 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964); *Reynolds v. Sims,* 377 U.S. 533, 555 (1964); *Dunn v. Blumstein,* [405 U.S. 330, 336 (1972)].

Id. at 184.

R.C. 3513.257 does abridge fundamental rights of the plaintiffs. The deadline prevents plaintiff Anderson from appearing as a candidate on the Ohio ballot in the November election. It likewise prevents plaintiff George H. Hetrick from qualifying as a candidate for presidential elector pledged to support Anderson in that election. In so doing, the law clearly burdens these plaintiffs' rights of expression and association secured by the First Amendment. It implicates an individual's "important interest in the continued availability of political opportunity," *Lubin v. Panish,* 415 U.S. 709, 716 (1974), and

his right "to associate for the advancement of political beliefs." *Williams v. Rhodes, supra,* 393 U.S. at 30. Denying these plaintiffs access to the ballot may not directly penalize the exercise of their right to associate, but it does diminish the effectiveness of their exercise of the right.

While Anderson may still participate in the election by virtue of Ohio's write-in procedure, it requires little discussion to recognize that a write-in candidacy is an inadequate alternative to ballot placement. As the Supreme Court observed in *Lubin v. Panish, supra,* 415 U.S. at 719, n.5 "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."

The First Amendment associational rights implicated by the deadline are inextricably bound up with a candidate's First Amendment rights of expression, which are also abridged by the filing deadline. As the Supreme Court recognized in *Illinois Board, supra,* 440 U.S. at 186, "an election campaign is a means of disseminating ideas as well as attaining political office. . . . Overbroad restrictions on ballot access jeopardize this form of political expression." In some ways, ballot placement may signal the political viability of a campaign and trigger funding, media coverage, and credibility in the minds of voters. All serve to open channels for the dissemination of the candidate's political message.

In a similar fashion the individual's right to a place on the ballot overlaps with and is intertwined with fundamental rights of the voters. *Williams v. Rhodes, supra,* 393 U.S. at 30; *Lubin v. Panish, supra,* 415 U.S. at 716. By preventing Anderson from appearing on the ballot, the filing deadline denies plaintiff Leslie Laufman, M.D., and other registered voters in Ohio like her who wish to cast their vote in the 1980 general election for the slate of electors pledged to Anderson, the constitutional right to associate for the advancement of political beliefs, *Kusper v. Pontikes,* 414 U.S. 51, 56-57 (1974) and the fundamental right "to cast their votes effectively" for the candidates of their choice. *Williams v. Rhodes, supra,* 393 U.S. at 23. As with the expression and associational rights of

the candidates themselves, the right to vote "has diminished practical value if the party [or candidate] can be kept off the ballot." *Illinois Board, supra,* 440 U.S. at 184.

Furthermore, in the case of a national presidential race, the state deadline affects the rights of voters supporting Anderson not only in Ohio, but also in other states where his name will appear on the ballot. Plaintiff Gerald M. Eisenstat is a registered voter in the State of New Jersey where Anderson's name has been certified to appear on the ballot in the 1980 general election. Eisenstat intends to cast his vote for the slate of electors pledged to Anderson in New Jersey. As of June 9, 1980, supporters of Anderson have gathered sufficient signatures (if determined valid) in each of ten states to place his name on the ballot as an independent candidate for President. Active petition drives are underway in nine additional states. Anderson's political campaign organization, the National Unity Campaign, has established an extensive network of offices nationwide. The Campaign intends to obtain and file the requisite number of signatures to qualify for the ballot in all the remaining states as quickly as possible. In addition to Ohio, it appears that Anderson has not met the filing deadlines of four states. The Anderson Campaign has instituted or intends to institute actions, if necessary, challenging those deadlines in order to obtain access to the ballots in those states as well.[4]

The goal of voters such as plaintiff Eisenstat in states where Anderson will appear on the ballot is to amass enough electoral votes to elect Anderson. Ohio's deadline, by denying Anderson a place on the ballot, removes the sixth largest slate of electors from Anderson's reach and thereby reduces the total pool of electoral votes for which he may compete nationwide by 25 electors. This arguably dilutes the vote of Eisenstat and others similarly situated. Although in a

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4 The Ohio deadline falls earlier in the election year than all but two other states: Maryland and New Mexico. The plaintiffs have already obtained a preliminary injunction placing Anderson on the ballot in New Mexico. *Anderson v. Hooper,* Case No. 80-432-M (D. N.M. July 8, 1980).

somewhat different context, the Supreme Court has noted that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds v. Sims,* 377 U.S. 533, 567 (1964).

The rights implicated by the Ohio filing deadline "rank among our most precious freedoms." *Williams v. Rhodes, supra,* 393 U.S. at 23. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). The right to vote secures all other First Amendment rights by enabling the people to choose those who would make and enforce the laws; at the same time, it seems to me, voting is itself an exercise of First Amendment rights because it affords a voice for the expression of political preferences and a vehicle for associating for the propagation of political beliefs.

In assessing the extent of the burden on the exercise of these rights, the amount of support for a barred candidate is relevant. *See, e.g., Williams v. Rhodes, supra,* 393 U.S. at 34. Anderson's losses in each of the Republican primaries he entered prior to April 24 indicate quite clearly he did not enjoy support from a majority of the Republican Party. On the other hand, the parties submitted five exhibits summarizing the results of opinion polls conducted by national polling organizations since the announcement of Anderson's independent candidacy reflecting that he has support from between 23% (nationally) and 44% (New York) of the electorate. He collected contributions from over 40,000 individuals during the five weeks between April 24, 1980 and June 3, 1980. Support for Anderson's independent candidacy appears to be substantial, and the number of persons in Ohio and elsewhere whose fundamental rights are implicated by the Ohio deadline is similarly substantial.

The Standard of Review under the First and Fourteenth Amendments

When rights as fundamental as these are substantially abridged by legislative enactment, the First and Fourteenth Amendments command that the law may be justified only if it is necessary to achieve a compelling state interest. I believe this is the import of the Supreme Court's decision in *Kusper v. Pontikes,* 414 U.S. 51 (1974). In *Kusper* the Court, in striking down a voter disaffiliation law, made no mention of the Equal Protection Clause, but grounded its decision directly on First Amendment protection of political association and the Due Process Clause of the Fourteenth Amendment:

> There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. *NAACP v. Button,* 371 U.S. 415, 430; *Bates v. Little Rock,* 361 U.S. 516, 522-523; *NAACP v. Alabama,* 357 U.S. 449, 460-461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. *Williams v. Rhodes,* 393 U.S. 23, 30. Cf. *United States v. Robel,* 389 U.S. 258.
>
> To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections. See, *e.g., Dunn v. Blumstein,* 405 U.S. 330; *Kramer v. Union School District,* 395 U.S. 621; *Carrington v. Rash,* 380 U.S. 89. As the Court made clear in *Williams v. Rhodes, supra,* unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments. 393 U.S., at 30. And see *id.,* at 35-41 (Douglas, J., concurring); *id.,* at 41-48 (Harlan, J., concurring).

* * * * *

> As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. *Bates v. Little Rock, supra,* at 524; *NAACP v. Alabama, supra,* at 463.

Id. at 56-58. And the Court in *Kusper* made it clear that a law infringing these rights be the least restrictive means to achieve the State's interest:

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton v. Tucker,* 364 U.S. 479, 488.

Id. at 58-59. And see *American Party of Texas v. White,* 415 U.S. 767, 780 (1974) in which it was stated, "whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests." (Citing *Storer v. Brown, supra,* at 729, 33; footnote omitted). *See also Williams v. Rhodes, supra,* 393 U.S. at 35-41 (Douglas, J., concurring); *id.,* at 44-48 (Harlan, J., concurring).

It may be that after *Kusper v. Pontikes* it is enough to find that a law such as this abridges constitutionally protectible rights under the First Amendment to trigger the State's duty to establish a compelling state interest justifying that abridgment. Nevertheless, the plaintiffs assert their claims additionally under the Equal Protection Clause of the Fourteenth Amendment. The Court will now address that argument.

Equal Protection

Plaintiffs' equal protection argument, simply put, is that the deadline unfairly discriminates against independent candidates with respect to the time when they, as compared with candidates of both major and minor parties, are required to qualify as candidates for the general election.

Under Ohio law, the names of the candidates of the two major parties are placed on the general election ballot by the Secretary of State after they are nominated by their respective national party conventions. R.C. 3505.10, 3513.11. In 1980, in the case of the Democratic candidate, this will not occur until approximately August 18. Minor party candidates need not certify their nominees to the Secretary of State until 75 days before the general election, that is, on or about August 20. R.C. 3505.10. This year the defendant will prepare the ballot after the completion of the national party nominating conventions in mid to late August.

The thrust of plaintiffs' argument appears to be that the early filing deadline compels independent candidates to declare their candidacy 75 days prior to the *primary* election, four to five months earlier than partisan candidates. By doing so, the deadline effectively locks independents into place on March 20, 1980, leaving the parties until late August to develop the issues and to choose a nominee they hope will best respond to those issues.

Viewed in another way, the deadline operates to bar any independent candidacies not declared by March 20 although party candidates may run in the general election without having filed on that date.

A

The Secretary of State argues that similar treatment is afforded the different types of candidates, and that no discrimination occurs because party candidates are also required to meet the March 20 deadline by causing their delegates to file at that time in order that they may participate

in the primary. The delegates, according to the Secretary of State, are in actuality surrogates for the candidate himself. Defendant argues that because the delegates are bound by local party rules to cast their first ballot at national nominating conventions for the candidate chosen by Ohio voters in the primary, and because the role of party primaries in the nominating process has become more important in recent years, it is unlikely that a party candidate can sit on the sidelines during the primaries, as for example General Eisenhower did in 1952, and become the nominee of a major party.

Therefore, according to the defendant's reasoning, both partisan and independent candidates for the most part are held to the same March 20 deadline, and there is no disparate treatment of them.

The Court cannot accept defendant's argument. The Ohio statutes require the independent to commit himself early in the election year to his independent candidacy and grant the parties, both major and minor, until late August to choose their candidates. Regardless of the likelihood of such an occurrence, the statutes do permit a partisan candidate to receive the nomination of his party and thereby appear on the Ohio general election ballot in November, without previously having had to file with the Secretary of State. To these partisan candidates, emerging from the political conventions in mid-summer, R.C. 3513.257 has no application. If a party candidate does not file on March 20, he is by no means barred from running as his party's choice in the coming general election. An independent's failure to file at that early date does in fact work such a forfeiture.

In addition, defendant's argument tends to ignore material differences between running as a candidate in the general election and running as a candidate in a party primary. In order to win the primary, partisan primary candidates aim to attract the support of other partisans. At a general election, candidates appeal to the entire national constituency. Before the party primaries, surely the general election campaign issues and the positions of the candidates have not yet crystallized.

The platform positions upon which party candidates run in the general election are hammered out at the convention, long after the primary. When the party candidate files his declaration of candidacy on March 20, he is making the statement that he intends to vie in the primary for the votes of members of his party: whether he will run in the general election as his party's choice is by no means assured. On the other hand, when the independent files his declaration of candidacy and his nominating petitions on March 20, he is making the statement that he intends to run, not in the primary, for he is not in that race, but in the general election in November.

In some respects, running in the party primary is an exercise—an experiment aimed at determining whether the candidate can raise enough support and enthusiasm among party members to allow for a continued quest for the presidency. By March 20, before the primary winners are known or party platforms established and far ahead of the final selection of the party candidates, the independent must evaluate the support and enthusiasm for his candidacy and determine whether he should run in the general election seven months later.

For these reasons, the Court concludes that the Ohio statutory scheme does in fact treat partisans and independents differently. The question then becomes whether these differences in treatment are justified by functional dissimilarities between the two types of candidacies.

B

The Supreme Court has noted that "[t]he fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and in providing different routes to the printed ballot." *American Party of Texas v. White,* 415 U.S. 767, 782 n.13 (1974), quoting from

Jenness v. Fortson, 403 U.S. 431, 441-42 (1971). The Supreme Court has recognized that it could be a violation of equal protection were the State to treat identically what in the political arena are two fundamentally different forms of candidacy. *Jenness v. Fortson, supra,* 403 U.S. at 442.

Applying this reasoning, it can be argued that there may be no invidious discrimination between entities which are by nature to be handled differently. One cannot compare for all purposes the independent candidate with the candidate who conducts his campaign within the party system; nor can one compare him with a party. It seems equally clear, however, that statutory line-drawing that operates to abridge fundamental rights of some persons must be explicable in terms of differences between the persons on either side of the line.

In the Court's view, the partisan candidate for the national office of President is similar enough in critical ways to the independent candidate for that office, that to treat the two dissimilarly, *i.e.,* by subjecting the independent to R.C. 3513.257 and not the partisan, arguably states a claim under the Equal Protection Clause.

Thus notwithstanding the extreme importance of the partisan candidate's affiliation with the support superstructure and machinery of a political party, a critical element of his success or failure at the general election is the personal constituency which must rally to his cause. This vital support depends significantly on the candidate's appeal as an individual.

Likewise an independent candidate looks to develop a constituency that is attracted to him as an individual as well as to his stance on the issues. It is not, then, unrealistic to find that a voter seeking a presidential candidate to support often looks not so much at labels, but at *persons.* Because the personal and issue appeal of a partisan candidate vies in many respects equally on the political field with the independent's personal and issue appeal, the disparate treatment accorded these candidates in Ohio may well be suspect under the Equal Protection Clause.

At minimum there is sufficient similarity in the candidacies of the two to require that any law treating them differently be narrowly drawn to afford the greatest protection to the fundamental rights involved.

The Standard of Review under the Equal Protection Clause of the Fourteenth Amendment

In *Illinois Board v. Socialist Workers Party,* 440 U.S. 173 (1979), the Court applied a standard equal protection analysis, balancing the interests of the State in maintaining a classification against the burdens on fundamental rights imposed by the classification, and holding that the classification was unnecessary to achieve any compelling interest:

> When such individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. *American Party of Texas v. White,* 415 U.S. 767, 780-81 (1974); *Storer v. Brown,* 415 U.S. 724, 736 (1974); *Williams v. Rhodes, supra,* at 31.
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> * * * * *
>
> The signature requirements . . . are plainly not the least restrictive means of protecting the State's objectives . . . appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago.

Id. at 184-86.

The Secretary of State argues vigorously that the compelling interest standard stated in *Illinois Board* is not applicable to this case because the Supreme Court in *Illinois Board* dealt with a statute which, on its face, evidenced a blatant discrimination. The defendant urges further that the Court should employ a test set forth in *Storer v. Brown,* 415 U.S. 724 (1974) and *Mandel v. Bradley,* 432 U.S. 173 (1977) to require a preliminary showing by plaintiffs that Anderson is a "reasonably diligent candidate" before bringing a compelling state interest analysis into play.

The Court rejects both of these arguments for the following reasons. First, it is clear from the language of the Court's opinion in *Illinois Board* and from the facts of that case that it was analyzing the constitutionality of the statute as applied rather than on its face.[5]

Second, the Supreme Court in *Storer* and *Mandel* did not eschew the application of a compelling interest standard of review. A careful reading of the *Storer* opinion indicates the Court applied that standard, finding that a compelling state interest justified barring one set of plaintiffs from the ballot, and that its application was frustrated by an inadequate record as to the others.

The defendant's contention that the *Storer* Court propounded a new test establishing a threshold which must be crossed by the challenger before the State need assert any compelling interest is predicated on the following passage from that opinion:

> Third, once the number of signatures required in the 24-day period is ascertained, along with the total pool from

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5 The statute at issue in *Illinois Board* provided different signature requirements for different political offices. Thus, new political parties and independents were required to obtain the signatures of 25,000 qualified voters to appear on the ballot in statewide elections. 440 U.S. at 175. In order to appear on the ballot for offices of political subdivisions of the state, the signatures of 5% of the number of persons voting in the last election for offices within the particular subdivision were required. That this distinction does not facially demonstrate blatant discrimination is plain given that in most subdivisions of a state, 5% of the voters in a particular subdivision election would represent far fewer than 25,000 signatures. The Court recognized "[t]hat the distinction between state and city elections undoubtedly is valid for some purposes" but that this fact did "not resolve whether it is valid *as applied here.*" *Id.* at 184.

The Court found that the distinction, *"as applied in the City of Chicago," id.* at 183, produced the incongruous result that a new party or an independent candidate for mayor of Chicago need obtain substantially more than the 25,000 signatures required for a statewide office. Because Chicago is such a populous subdivision, 5% of the voters at previous Chicago elections exceeded 25,000. Finding no compelling interest advanced to justify the apparent anomaly, the Court did not strike down the statute as invalid on its face but limited its holding to the City of Chicago. *Id.* at 187.

> which they may be drawn, there will arise the inevitable question for judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Storer v. Brown, 415 U.S. 724, 742 (1974). *See also Mandel v. Bradley,* 432 U.S. 173, 177-78 (1977).

Placing the passage in its proper context, the Court simply cannot accept the defendant's novel theory that this passage propounds a new standard of review in ballot access cases.[6]

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6 In *Storer,* four independents sought access to the ballot, two for the United States Congress and two for the national offices of President and Vice President. All four challenged provisions of the California Elections Code forbidding ballot position to an independent if he voted in the preceding primary, had a registered affiliation with a qualified political party within one year prior to the last primary, or obtained signatures of less than 5% of the vote cast in the last general election. All signatures were required to be obtained in a 24-day period and none could be those of voters at the primary. *Storer v. Brown,* 415 U.S. 724, 726-27 (1974).

In Part I of the opinion, the Court found that both men seeking congressional office were disqualified by their affiliation with a political party within the preceding year. Applying the test set forth in *Williams v. Rhodes,* the Court concluded the disaffiliation requirement served a compelling state interest. *Storer v. Brown, supra,* 415 U.S. at 736. *See infra.* Finding these candidates validly barred, the Court found no need to examine the other challenged provisions as applied to them.

In Part II, the Court addressed the challenges of the presidential hopefuls to the signature provisions requiring at least 5% of the prior vote cast to be gathered in 24 days from persons who had not voted in the primary. Attempting to apply an equal protection balancing analysis, the Court found itself unable to ascertain the precise impact of the laws, a finding crucial to the determination of whether they were necessary means to a legitimate end. In order to determine the extent of the burden imposed by the 5% requirement, it was necessary to know how many votes were cast in the preceding election. In order to know whether that number could reasonably be obtained from persons not voting in the primary, it was necessary to know how many persons voted in the primary. Only then could the Court "assess realistically" the impact of the law on prospective candidates. *Storer v. Brown, supra,* 415 U.S. at 738.

(footnote continued on next page)

The passage relates to a claim that the statutory requirement that independent candidates obtain a given percentage of signatures within a 24-day period unfairly excluded independents from the ballot.

The test stated by the Supreme Court in *Storer* is a guide for determining the facts relevant to the legal questions raised by the petitioners in *Storer*. Obviously, one cannot balance considerations whose relative weight is unknown. It was necessary for the trial court to apply the test stated by the Supreme Court in *Storer* to arrive at the facts necessary to apply the standard established by other cases.

Third, the *Storer* test is inapplicable to the facts of the case at bar. Anderson does not claim that the filing deadline or any other Ohio law places an onerous burden on him to gather sufficient signatures to show substantial community support.[7]

Accordingly, the Court remanded the case for further factfinding. Before doing so, however, the Court resolved three issues to clarify the guidelines for further proceedings in the district court. The first concerned the validity of disqualifying persons voting in the primary from signing an independent's petition. The second voiced the Court's concern that the disqualification of such persons who voted in a nonpartisan primary may not have been supported by a compelling state interest. The third is the passage quoted above, stating the test to be applied once the facts were found regarding the number of signatures required.

7 The defendant urges that the Supreme Court's decision in *Mandel v. Bradley*, 432 U.S. 173 (1977) is factually analogous to the case before the Court because it concerned an early filing date with no time limit for gathering signatures. In *Bradley*, the Supreme Court criticized the lower court for construing its summary affirmance in another case, *Tucker v. Salera*, 424 U.S. 959 (1976), *aff'g* 399 F.Supp. 1258 (E.D. Pa. 1975), as controlling precedent for the broad proposition that early filing dates were unconstitutionally burdensome on an independent's access to the ballot. *Bradley, supra*, 432 U.S. at 175. The Court distinguished *Salera* from *Bradley* on the grounds that in addition to the early filing date in *Salera* there was also a limited time period for gathering signatures, which increased the difficulty of meeting the signature requirements. *Id.* at 177. As it had done in *Storer*, the Supreme Court remanded the *Bradley* case for further factual inquiry, instructing the district court to undertake the *Storer* inquiry into the ability of a reasonably diligent candidate to satisfy the ballot access requirements. Reading *Bradley* liberaliy, one may argue

The facts submitted by the parties show that Anderson supporters gathered more than three times the number of required signatures in Ohio within a five-day period. There can be no question that Anderson was "reasonably diligent" in satisfying Ohio's minimal signature requirements once he decided to run as an independent.

The "reasonable diligence" of the candidate is simply not a relevant consideration when the issue posed by the challenged law is a filing deadline, for that deadline, in this case at least, measures only the time that a candidate must reach a decision about whether to run. *See Mandel v. Bradley,* 432 U.S. 173, 181-82 (1974) (Stevens, J., dissenting). Thus, as plaintiffs noted in oral argument, a "reasonably diligent candidate" could meet the deadline within the meaning of *Storer,* and the deadline could still be constitutionally unsound. For example, if Ohio were to set the filing date in November of the year preceding the general election and require only 100 signatures to qualify for ballot placement, most candidates who had by November decided to run for office would presumably be able

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that it commands application of a *Storer* "reasonable diligence" factual inquiry to a challenge to an early filing deadline standing alone and uncomplicated by signature-gathering requirements.

However, the *Bradley* case is distinguishable. Like *Storer,* the issues concerned the State's legitimate interest in requiring some showing of community support and the extent of burdens imposed on a candidate trying to demonstrate that support.

Mr. Bradley himself started quite early and attempted over a period of months to acquire the necessary signatures by the March deadline. Bradley submitted a few thousand more than the 51,755 signatures required, but over 10,000 were thereafter invalidated and he was disqualified. Bradley filed suit challenging both the deadline and the signature requirement on the ground that the "early filing deadline made it more difficult for Bradley to obtain the requisite number of signatures than for a party member to win a primary . . . ." *Mandel v. Bradley, supra,* 432 U.S. at 174. He placed in issue the effect of the deadline in combination with the signature requirement to deprive him of the opportunity to demonstrate his community support. In erroneously assuming that the Supreme Court's affirmance in *Salera* mandated a holding that the filing date by itself was *per se* unconstitutional, the District Court failed to undertake an independent analysis of the interaction of the deadline with the signature requirement. *Id.* at 178.

to acquire enough signatures, and defendant's *Storer-Bradley* "threshold" test would apparently be satisfied. That fact, however, would not preclude the Court from inquiring whether the State has a compelling state interest in requiring a potential candidate to commit himself so far in advance of the general election.

What is at issue in this case is the State's power to demand that an independent candidate reach a decision about whether to run months before a primary in which he does not take part, and the State's power to require this of him when it is not required of all partisan candidates. I cannot accept the defendant's contention that the State may measure in terms of *Storer-Bradley* "diligence" the time a candidate makes up his mind to run for office.

Finally, the *Illinois Board* analysis states no new principles. It merely applies principles enunciated in earlier cases. In a case concerning the unconstitutionality of poll taxes, the Supreme Court stated "that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966).

This standard of review was translated into the language of *Illinois Board* through a series of decisions concerning voting and associational rights including *Kramer v. Union School District,* 395 U.S. 621 (1969) (state apportionment statutes); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (durational residence laws). *Williams v. Rhodes, supra,* confronted with the unusually heavy burdens discussed above, applied the same test:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button,* 371 U.S. 438 (1964).

Accordingly, the standard of review under the Equal Protection Clause of R.C. 3513.257 must be whether it is necessary to further a compelling state interest.

Compelling State Interests

Having found above that the filing deadline substantially abridges First Amendment and fundamental rights of the plaintiffs and discriminates between persons in many respects similarly situated, the Court must determine whether it does so in furtherance of compelling state interests.

First, it is important to note what state interests are *not* in issue in this case. The defendant does not contend that the filing date of March 20 is necessary to permit the State a certain period of time to perform the administrative tasks necessary to place a candidate's name on the ballot, such as verifying signatures, resolving challenges, and printing ballots. Certainly the State has a legitimate interest in requiring candidates to file their papers in time to perform these administrative matters. *See, e.g., Salera v. Tucker,* 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd,* 424 U.S. 959 (1976). But the Secretary of State has conceded that the nominating petitions filed on March 20 remain unprocessed in his office until June 15, when he transmits them to county boards of election. The boards do not begin actually verifying the signatures until the period July 1 to July 15. Finally, the Secretary of State does not certify the names of presidential candidates (including independents) for inclusion on the ballot until after the party nominating conventions, sometime in late August. Based upon the stipulated facts, it appears that no more than 75 days are necessary to perform these tasks. The State's interest, from an administrative standpoint, in an orderly processing of names for inclusion on the ballot has not been and cannot be asserted to justify a deadline 229 days prior to the general election.

The Court will now turn to an analysis of the state interests which defendant claims are promoted by the legislation in issue. Chief among the interests asserted is the preservation of

the State's political stability. Defendant relies heavily on Part I of *Storer v. Brown, supra,* as support for this proposition. As noted above, in Part I of *Storer* the Supreme Court dealt with a challenge to several provisions of the California Elections Code brought by two independent candidates for Congress. These candidates challenged the Code's "disaffiliation" provisions which prohibit a candidate from running as an independent if he either voted in the immediately preceding primary election or had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary. The Supreme Court had "no hesitation" in sustaining this provision, finding that it advanced a "general state policy aimed at maintaining the integrity of the various routes to the ballot." 415 U.S. at 733.

In reaching its decision in *Storer* the Court detailed the nature of the California direct party primary system, the goals of which the Court found were supported by the disaffiliation requirements:

> Section 6830(d) . . . protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.
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> * * * * *
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> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Nor do we have reason for concluding that the device California chose, § 6830(d)

> (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated in *Rosario,* the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot.

415 U.S. at 436-47 (footnote omitted).

From the above there can be no doubt that a state has, as the defendant claims, a legitimate and compelling interest in maintaining the stability of its political processes. The defendant argues therefore that R.C. 3513.257 fosters this interest in Ohio by in effect acting as a disaffiliation statute as to Congressman Anderson. In other words, the defendant claims that Anderson would have been able to meet the March 20 deadline if only he had decided at some point earlier than March 20 to disaffiliate, and cease his activities in the Republican state primaries.

Although the defendant's argument has some surface appeal, several points are clear. First, the statute gives absolutely no indication on its face that it was intended to be a disaffiliation provision. Indeed it is difficult to identify any basis for so finding. R.C. 3513.257 would not bar the staunchest party member who decided on March 19 to change horses and file as an independent, for example, nor would it permit a true independent to run, if he or she filed on March 21. Likewise, Anderson apparently could run in the other 49 states as a Republican, and R.C. 3513.257 would not bar him from running as an independent in Ohio so long as he filed here as such by March 20. Thus, unlike the California provisions upheld in *Storer,* which were plainly drafted to effect a comprehensive and nondiscriminatory disaffiliation scheme, *see,* 415 U.S. at 733, it is clear that R.C. 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design.

Second, even if the Court were to assume that the Act is a disaffiliation provision, the defendant has not been persuasive that the compelling state interest which the Supreme Court found in the context of a statewide election in Part I of *Storer* is equally compelling in an election for the national office of President. Indeed, it is undisputed that California does not even apply its disaffiliation laws to a presidential candidate. Nor has the Court's attention been drawn to any case in which a State's disaffiliation statute has been applied to such a candidate. Thus when the defendant argues that the burden placed on Congressman Anderson by R.C. 3513.257 is minimal compared to the one-year disaffiliation requirement exacted by California, he strains to force a national peg into a state hole.

Finally, Ohio does have a disaffiliation statute of sorts in R.C. 3513.04,[8] the so-called "sore loser" provision, which prohibits a candidate from seeking a place on the general election ballot by means of nominating petition or by write-in when he has filed a declaration of candidacy for a party nomination in the preceding primary. Because Anderson withdrew from the Ohio primary in time to have his name removed from the ballot, the State concedes that R.C. 3513.04 does not apply to him. Nevertheless, the defendant argues that R.C. 3513.04, when combined with R.C. 3513.257 here at issue comprises a "comprehensive yet reasonable regulation" which serves to further the state interests recognized as valid in *Storer*. This attempt to bootstrap R.C. 3513.257 into a compelling interest is not convincing. Again, the mere coincidence of the facts that a filing deadline bars a candidate from getting on the ballot as an independent and that the candidate was formerly a partisan, hardly transforms the deadline statute into a disaffiliation act. Further, the Court is

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8 The defendant argues that R.C. 3513.04 is directed at barring party-affiliated candidates who lost in the primary from running as independents in the general election. While that is true, the statute also bars them from running as partisans. *See, State ex rel. Gottlieb v. Sulligan,* 175 Ohio St. 238 (1963).

not persuaded that R.C. 3513.257 and 3513.04 "dovetail" into a reasonable and coordinated State scheme for promoting political stability simply because both statutes may operate to bar former partisans from running as independent candidates.

In short, the defendant has demonstrated no interest served by the filing deadline other than its simple function as an arbitrary point in time by which independent candidates must officially throw their hats into the political ring.[9] Nor can the

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9 The defendants contend that this case is controlled by the Supreme Court's summary affirmance of the decision of *Sweetenham v. Rhodes,* decided together with *Socialist Labor Party v. Rhodes,* 318 F.Supp. 1262 (S.D. Ohio 1970) (three-judge court), *aff'd sub nom. Sweetenham v. Gilligan,* 409 U.S. 942 (1972). The Court rejects the defendant's position.

The Supreme Court has repeatedly cautioned against attaching broad precedential significance to summary affirmances. Lower courts are bound by summary actions on the merits by the Supreme Court, *Hicks v. Miranda,* 422 U.S. 332 (1975), but because a summary affirmance affirms the judgment only and not the reasoning of the lower court, *Mandel v. Bradley,* 432 U.S. 173, 176 (1977), its precedential value is limited to the precise questions presented and necessarily decided by it. *Id.*

A review of the opinion of the three-judge court in *Sweetenham* reveals quite clearly that the constitutional issue here presented was not necessarily decided in the summary affirmance of that judgment. The entire analysis relative to the filing deadline appears at page 1273:

> Plaintiffs allege that those parts of Sections 3513.257 and 3513.258, Ohio Revised Code, which require nominating petitions to be filed "not later than 4:00 P.M. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding [the] general election" are unconstitutional.
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> The state has an interest in having persons who otherwise qualify for ballot position officially become candidates at a designated time prior to an election. In addition, the state may reasonably require that all persons seeking elective office become officially declared candidates on or before a certain date preceding an election. One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process.
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> The plaintiffs Sweetenham and Stapleton herein had not taken steps to become candidates prior to the May 1970 primary election. Plaintiff Sweetenham had obtained 1,600 signatures on her nominating petition by June 29, 1970. Plaintiff Stapleton had obtained 2,455 signatures on his nominating petition by June 29, 1970. Neither plaintiff has filed or tendered a nominating petition

Court discern any aspect of the nature of independent versus partisan candidacies to justify compelling independents, and not all partisans, to commit themselves to their candidacy on March 20. Indeed, the functional dissimilarities would appear to counsel against requiring this of independents who do not participate in the primary contest. Defendant has advanced no compelling interest to support the difference in treatment accorded by the Ohio law.

Defendant argues that the State certainly must set some deadline for filing by independent candidates, and that under Article II, § 1 of the United States Constitution,[10] the State legislature is given broad discretion to direct how and when this may be done. Ohio made a similar argument to the Supreme Court in 1968. The answer of the Court there, in *Williams v. Rhodes, supra,* is equally applicable here:

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with the designated state or county official. Candidates for parties which participated in the primary election were chosen in the May 1970 primary election. The Socialist Labor Party candidates whom this Court has held are entitled to ballot position were chosen on April 26, 1970.

The Court holds that plaintiffs Sweetenham and Stapleton, who did not officially declare their candidacy at or before the time Ohio requires political parties to choose their nominees, are not entitled to ballot position.

The judgment in *Sweetenham* rests on the failure of the challenging plaintiffs to allege a real and immediate injury presenting a case or controversy within Article III of the United States Constitution that would be capable of adjudication by the district court. Having failed even to tender a nominating petition, neither Sweetenham nor Stapleton were in a position to place in issue a deadline regulating the time for filing those petitions.

The Court, in fact, never reached the constitutional issue and certainly did not decide it. Its discussion of the State's interest in having candidates declare their candidacies by a specific date before an election reflects the Court's concern that the plaintiffs in that case had not taken any steps to qualify themselves as candidates at or before the party candidates were chosen.

For these reasons the Court believes its *Sweetenham* decision is of no precedential effect on the central issues decided herein.

10 The relevant clause provides in pertinent part, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ." to choose a President and Vice President.

> There, of course, can be no question but that [Art. II, § 1] does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the State specific power to legislate in certain areas. These granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. . . . . Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No State shall . . . deny to any person . . . the equal protection of the laws."

393 U.S. at 29. Nor can it be doubted that the State legislature's discretion in fixing a filing deadline must be bounded by the First Amendment rights of candidates and voters. Where a deadline acts to impede these rights the Court must perforce analyze the State's interest in imposing such a limitation on important constitutional rights.

In *Rosario v. Rockefeller,* 410 U.S. 752 (1973) the Court upheld the constitutionality of a New York statute which requires a voter to enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. The effect of that statute is to require party registration some eight months before a presidential primary and eleven months before a nonpresidential one. The petitioners claimed that the statute unduly burdened their First and Fourteenth Amendment rights to exercise the franchise and to associate with the political party of their choice. The Court framed the issue as follows:

> The only remaining question, then, is whether the time limitation imposed by § 186 is so severe as itself to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise or on their freedom

> of political association. As the dissent acknowledges, the State is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election. . . . Hence, our inquiry must be whether the particular deadline before us here is so justified.
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> It is true that the period between the enrollment deadline and the next primary election is lengthy. But that period is not an arbitrary time limit unconnected to any important state goal.

410 U.S. at 760. The *Rosario* Court found that the burden imposed by the New York statute was justified because it served the important state goal of "preserving the integrity of the electoral process," 410 U.S. at 761, by inhibiting party "raiding." The four-justice dissent argued that the asserted stated interest was "hardly substantial enough" to justify the impediment raised by the statute. 410 U.S. at 769.

In the Court's view the present case is readily distinguishable from *Rosario* simply because the filing deadline imposed upon independent presidential candidates by R.C. 3513.257 serves no compensating state interest such as that found in *Rosario*. As already noted, the only justification seriously raised by the defendant is that of political stability, a justification which the Court has found to be tenuous at best. Even if the statute in fact served such a legitimate purpose, it would have to do so in a manner which avoids unnecessary restrictions on constitutional freedoms since "[s]tatutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). The Court will now turn to this inquiry.

In 1976 this Court heard a challenge to another provision of Ohio's election laws, R.C. 3513.191, which prohibited a person from running as a party candidate in a primary election if he had voted as a member of a different political party

within the preceding four years. *Kay v. Brown*, 474 F. Supp. 588 (S.D. Ohio 1976) (three-judge court). There the State claimed that the statute implemented a number of compelling interests, including the preclusion of political candidacies prompted by short-range goals, ensuring party loyalty, and ensuring that candidates did not affiliate with political parties for "opportunistic reasons." *Id.* at 593. Recognizing that these goals were legitimate ones, this Court nevertheless found that the statute by which the State purported to advance these goals was impermissibly broad, as applied to the particular plaintiff in the case, since it in effect locked him into a political party which in fact had become defunct. The Court there reminded this defendant's predecessor of the Supreme Court's admonition that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.*, quoting from *NAACP v. Button*, 371 U.S. 415, 438, and that

> [i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Id., quoting from *Kusper v. Pontikes, supra*, 414 U.S. at 59.

The Supreme Court reiterated this important theme most recently in *Illinois Board, supra*:

> [O]ur previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty . . . and we have required that States adopt the least drastic means to achieve their ends. . . . This requirement is particularly important where restrictions on access to the ballot are involved.

440 U.S. at 185 (citations omitted). *See also McCarthy v. Austin*, 423 F. Supp. 990, 997 (W.D. Mich. 1976).

In the Court's view, R.C. 3513.257 fails the test of precision which it so clearly is required to pass under the doctrine set

forth above. The State has advanced no compelling reason for requiring an independent candidate to meet a filing deadline 75 days before a primary election in which he does not participate, and which is some 229 days before the general election.

The State argues that because partisan candidates are required to file at the same time as independents, the early deadline is justified because it treats all candidates "equally." Again, the superficial appeal of this argument fails under scrutiny. First of all, the deadline, set 75 days before the *primary* election, is arguably a reasonable one for the candidates who decide to run in that race. However, the Court cannot find any legitimate state interest in tying an *independent* candidate to that deadline.

The defendant claims that permitting an independent to declare later than party candidates would allow the independent to play "dog in a political manger" by withholding his candidacy until after party candidates are chosen in the primaries. Even assuming that this apprehension has some foundation in a *statewide* election, *see, e.g., Sweetenham v. Rhodes*, 318 F. Supp. 1262, 1273 (S.D. Ohio 1970), which the Court need not now decide, such concern is substantially diminished in a national election where the party candidates are not chosen until July or August and where all candidates must respond to national, not just state, issues. In any event, the Court is not persuaded that the states have a compelling interest in preventing candidates as early as March 21 from emerging and declaring in response to important newly-arising issues, particularly when such candidates may well reflect the conscience of a substantial number of voters. Of course in the context of a presidential election the political parties have an opportunity to respond to such shifting and emerging national issues after the State's filing deadline because they do not name their candidate or establish the party platform until the conventions in late summer.

The Court does not quarrel with the proposition that states generally have an important interest in maintaining their ballots within manageable and understandable limits:

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidates' desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the State's effort to eliminate as many such as possible.

Lubin v. Panish, supra, 415 U.S. at 715. Equally important, however, is the concern that access to the ballot of "serious" candidates not be unduly restricted. A State must strike a balance between its interest in maintaining a manageable ballot and its duty to provide access thereto for serious candidates:

> The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.
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> This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

Id. at 715-716.

From the above perspective, Ohio's system for regulating ballot access is less than a model of precision. The State's extremely lenient signature requirements allow ready access to the general election by virtually any candidate seeking a place thereon, yet its early filing deadline can have the effect, as it does here, of arbitrarily interdicting the access of a candidate with undisputed wide community support.

It appears that the State could more effectively strike the required balance by screening the "frivolous" independent candidates for President by, for example, gauging their community support with stricter nominating signature requirements and then moving the filing deadline to a date closer to the general election, thereby making less drastic the present bar to the ballot erected by R.C. 3513.257. Such an alteration is of course a matter for the Ohio legislature and not this Court. What *is* for this Court, however, is the decision whether the deadline set by R.C. 3513.257, as applied to independent candidates for President, passes constitutional muster. Because I find, as detailed above, that the impediment set in the path to the ballot of such candidates by R.C. 3513.257 is unduly restrictive and not justified by any compelling state interest, the statute is constitutionally infirm.

Conclusion

In conclusion, the Court holds that R.C. 3513.257 substantially abridges the constitutional rights of association of Anderson and his supporters and the fundamental right to vote of his supporters. It also discriminates against independent candidates and in favor of partisan candidates. Neither the abridgment nor the discrimination are justified by compelling state interests.

It is not the prerogative for this Court to establish a particular filing date which in its judgment would pass constitutional muster. That is a decision for the Ohio General Assembly in the first instance. The Court merely holds that the filing date of March 20, or 75 days before the June

primary, is too early in the election year to be justified by a compelling state interest and to be the least restrictive means to achieve the interests it purportedly does serve. Under the circumstances, the Court will grant the plaintiffs the relief they seek and leave to the Ohio legislature the task of establishing a date which serves compelling interests without unnecessarily restricting constitutionally protected liberty.

ORDER OF DISTRICT COURT
(annexed to Opinion)

ORDER

The motion for summary judgment of defendant Anthony J. Celebrezze, Jr. is DENIED; the motion for preliminary injunction of the plaintiffs is now moot and is therefore DENIED; and plaintiffs' motion for summary judgment is GRANTED.

It is ADJUDGED and DECREED that R.C. 3513.257, as applied to plaintiffs Anderson and Hetrick, is violative of plaintiffs' rights to political association under the First and Fourteenth Amendments to the United States Constitution, and is violative of plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution. The Clerk of Courts shall enter judgment for the plaintiffs.

It is hereby ORDERED that the defendant Secretary of State accept and process the plaintiffs' petition and other documents as if timely filed under R.C. 3513.257. It is further ORDERED that the defendant cause Anderson's name to appear on the Ohio ballot in the November 4, 1980, presidential general election, if aside from R.C. 3513.257 he has otherwise met the requirements of Ohio's election laws.

/s/ ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

Appendix to Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C-2-80-400

JUDGE DUNCAN

JOHN B. ANDERSON, *et al.*,
2711 Highcrest Road
Rockford, Illinois 61107

Plaintiffs,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
30 East Broad Street
Columbus, Ohio 43215,

Defendant.

JOINT STIPULATION OF FACT

The parties agree, by and through their counsel, that the following facts are stipulated to be true and correct, for the purposes and only for the purposes of this case,[1] but the parties reserve all objections on the grounds of relevancy.

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1 Some of the facts contained in this stipulation are in the peculiar knowledge of one party and have been provided to the other party; in these instances, the other party may have no independent knowledge of such facts but is agreeing not to contest them for the purposes of

1. John B. Anderson seeks to run as an independent candidate for President of the United States in the 1980 general election and meets the qualifications prescribed in the Constitution for election to that office.

2. George H. Hetrick is a duly registered voter in the State of Ohio who has been designated to seek certification as a candidate for Presidential elector in the 1980 general election pledged to the candidacy of plaintiff Anderson. His name was included on a slate of candidates for Presidential electors, pledged to support the independent candidacy of plaintiff Anderson, tendered to defendant Celebrezze on May 16, 1980. Plaintiff Hetrick meets the qualifications prescribed in the Constitution for election to the office of elector.

3. Leslie Laufman, M.D., is a duly registered voter in the State of Ohio who wishes to cast her vote in the 1980 general election for the slate of electors pledged to plaintiff Anderson.

4. Gerald M. Eisenstat is a duly registered voter in the State of New Jersey, in which plaintiff Anderson's name has already been certified to appear on the ballot in the 1980 general election as an independent candidate for President of the United States. Plaintiff Eisenstat intends to cast his vote in the 1980 general election for the slate of electors pledged to plaintiff Anderson in New Jersey.

5. Defendant Anthony J. Celebrezze, Jr., is the Secretary of State of the State of Ohio. As such, he is charged by law with responsibility for the administration of elections in Ohio, including the procedures by which, among other things (i) nominating petitions filed by independent candidates for President and Vice-President are received by the State of Ohio

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this action. For example, many of the facts describing the Anderson candidacy are not within the independent knowledge of the Secretary of State; they are, however, taken substantially verbatim from facts admitted into evidence in the record by a federal court judge at a trial conducted on June 6, 1980, *Anderson, et al. v. Bolger, et al.*, Civil Action No. 30-0340, E.D. N.Y.

and transmitted to the appropriate county Boards of Election of the State of Ohio for verification of the signatures contained therein, and (ii) the names of independent candidates who have been duly nominated for the offices of President and Vice-President are certified to all county Boards of Election for inclusion on the official ballot in the general election.

6. On April 24, 1980, plaintiff Anderson publicly announced his intention to pursue an independent candidacy for the office of President of the United States. At the same time, he publicly renounced his previously declared intention to seek the Republican Party's nomination for that office, although stating that he would remain a member of the Republican party, and filed with defendant Celebrezze a Notice of Withdrawal of Consent which resulted in his name being removed from the ballot of the Ohio Republican Party primary scheduled to be held on June 3, 1980.

7. The listing of plaintiff Anderson's name on the 1980 general election ballot will not be barred by the provisions set forth in the last sentence of Ohio Revised Code Section 3513.04.

8. Following plaintiff Anderson's announcement on April 24, supporters of his Presidential candidacy throughout the United States began making efforts intended to place his name as an independent candidate for President on the ballots of every state of the union in the November, 1980 general election.

9. Following plaintiff Anderson's announcement, a group of his supporters in Ohio began to secure the necessary signatures of registered Ohio voters to place plaintiff Anderson's name on the Ohio ballot in the 1980 general election as an independent candidate for President. Between May 10 and 15, 1980, supporters of plaintiff Anderson secured approximately 16,000 signatures of persons purporting to be Ohio registered voters. Under Ohio law, 5,000 valid signatures are required.

10. On May 16, 1980, supporters of plaintiff Anderson presented to the Secretary of State (i) a Statement of Candidacy by plaintiff Anderson, (ii) Nominating Petitions containing approximately 14,500 signatures of persons purporting to be eligible Ohio voters, (iii) a full slate of candidates for Presidential electors, including the name of plaintiff Hetrick, pledged to support the candidacy of plaintiff Anderson, and (iv) payment of $100 as filing fees for candidates for President and Vice-President. All of the materials described above in this paragraph which were tendered to defendant on May 16, 1980, including a certificate of candidacy bearing plaintiff Anderson's original signature, are contained in a box under seal dated June 7, 1980, and initialed by counsel for the parties herein.

11. Plaintiff Anderson's Statement of Candidacy and Nominating Petition would have been accepted for filing but for the fact that they were not filed within the time required by Ohio Revised Code Section 3513.257.

12. Defendant Celebrezze, to whom the foregoing papers were tendered, failed and refused to accept the Statement of Candidacy, Nominating Petitions, slate of candidates for Presidential Electors, and filing fees on the sole ground that they were not timely filed under Section 3513.257. At the time the supporters of plaintiff Anderson tendered the papers, they received a letter from the Secretary of State, a true, accurate, and authentic copy of which is attached hereto as Exhibit "A."

13. The results of several recent public opinion polls conducted by nationally recognized polling organizations are reported in the attached exhibits:

Exhibit B:

An ABC News-Harris Survey poll conducted during the period April 26-30 which was broadcast on national network television news and reported in many newspapers;

Exhibit C:

A Yankelovich, Skelly and White, Inc. survey poll conducted between May 14 and May 16, 1980 for TIME Magazine which was published in the June 2, 1980 edition of Time and elsewhere;

Exhibit D:

A Field Poll, conducted in mid-May in California, reported in the *New York Times* and elsewhere;

Exhibit E:

An Associated Press-ABC News "Exit Poll" conducted on June 3, 1980 in which major party voters who voted in the primaries in Ohio, California and New Jersey were interviewed as they left the polling place, reported on ABC national network television news and on the AP "A" wire;

Exhibit F:

A *New York Post* poll, conducted beginning May 17, and reported in the *New York Post* on June 6, 1980.

14. During his campaign for the Republican party nomination for President, plaintiff Anderson qualified for federal matching funds by raising the minimum required amount of money ($20 0) in each of 10 states from the required number of contributors. Prior to April 24, 1980, he raised a total of $3,908,571 of private contributions, and $40,469 from duly registered political action committees which, with matching funds of $2,680,347, amounted to $6,629,387. Plaintiff Anderson spent all but $307,000 of his federal matching funds, which sum was returned to the Federal Election Commission when he ended his Republican campaign. Prior to April 24, Congressman Anderson was on the ballot in nine Republican primaries where he received percentages of the vote ranging from approximately 9% in Georgia and Florida to approximately 31% in Massachusetts and 37% in Illinois.

In addition, he had an active campaign organization in a number of states in which delegates were chosen other than by primary. In total, he had acquired 55 delegates.

15. In addition to their efforts in Ohio, supporters of plaintiff Anderson have, since April 24 and as of June 9, gathered the requisite number of signatures (if valid) in ten states to place plaintiff Anderson's name on the ballot as an independent candidate for President. Campaign workers, paid and volunteer, have participated in these petition drives, and over 300,000 persons have signed the petitions in these states and others where petition drives are ongoing. The following is a brief summary of the petition activity as of May 30, 1980:

State	Date Signatures Were Filed	Number of Signatures Required	Approximate No. of Signatures Actually Filed
New Jersey	4/23/80	800	4,000
Michigan	5/05/80	18,339	62,252
Massachusetts	5/06/80	39,245	101,000
Utah	5/12/80	300	2,000
North Carolina	5/15/80	10,000	27,003
Ohio	5/16/80	5,000	14,500*
Kentucky	5/27/80	5,000	8,600
Kansas	5/21/80	2,500	6,000
8 States	----	81,184	225,455

* Petitions tendered but refused by Secretary of State.

In addition, by June 9, Anderson supporters had gathered more than the required number of signatures (if valid) in Maine (minimum of 4,000 and maximum of 6,000 required; 8,000 collected, 5900 to be filed on June 9), New Mexico (17,274 required; over 32,000 gathered) and West Virginia (7,510 required; 11,159 filed).

16. Additionally, plaintiff Anderson's campaign currently has active petition drives underway in Wisconsin, Illinois, Georgia, Idaho, Maryland, Missouri, Oklahoma, Texas, and Nevada.

17. The campaign intends to try to obtain and file the requisite number of signatures to qualify for the ballot in all the remaining jurisdictions in the United States as quickly as possible.

18. Plaintiff Anderson has filed suit in federal court in Kentucky challenging the constitutionality of that state's deadline. In addition to Ohio and Kentucky, the Anderson campaign intends to institute or participate in litigation challenging pre-April 24 filing deadlines in each of the three other states which have such deadlines, if necessary to seek to place plaintiff Anderson's name on the ballot in those states. In addition, Anderson has participated in a suit in the Supreme Court of West Virginia challenging that state's geographical distribution requirements for petition signatures, and in litigation instituted in federal court in the Eastern District of New York claiming that the extension by Congress of a lower postal rate for bulk third-class mail to the Democratic and Republican parties but not to plaintiff Anderson's campaign is unconstitutional.

19. Between April 24, 1980 and June 3, 1980, in a period of five weeks, the National Unity Campaign for John Anderson has raised over $1,300,000 in private contributions from all 50 states and the District of Columbia in amounts of $1,000 or less (as required by law) from over 40,000 individual contributors.

20. Between April 24, 1980 and June 3, 1980, the campaign has established 63 offices in 35 states. New offices are being established daily, and in the next 30-60 days the campaign anticipates that it will have offices open in all 51 jurisdictions. The campaign currently employs approximately 150 people in the National headquarters in Washington and in other offices throughout the country with a monthly payroll of approximately $100,000. Additionally, the campaign has signed a nationwide phone agreement with the Illinois Bell Telephone Company to provide the campaign efficient telephone service in all 51 jurisdictions. The sum of $150,000 has been deposited

in the D.C. National Bank in an irrevocable letter of credit, from which Illinois Bell covers the campaign's various deposit and installation costs.

21. After the March 20 filing deadline specified by Section 3513.257 and until shortly after the June primary, Ohio law does not impose upon the Secretary of State or his agents, and he or his agents do not undertake, any administrative tasks with respect to filed nominating petitions for independent candidates.

22. On June 8, 1979, Plaintiff Anderson declared his intention to seek the nomination of the Republican Party for President of the United States.

23. For nearly twenty years, plaintiff Anderson has served as a Republican member of the U. S. Congress from Illinois' 16th Congressional District. He is serving in his tenth term as a Member of Congress from that district, having run for and been elected as a Republican every two years beginning in 1960. In 1956, he ran as a Republican for, and was elected to office as, Winnebago (Illinois) County State's Attorney. He had never sought elective office as an independent prior to April 24, 1980, and he has never sought elective office as the candidate of any political party other than the Republican Party.

24. Prior to April 24, 1980, plaintiff Anderson's name appeared or was scheduled to appear on the ballots of 27 of the 36 states that hold Republican primary elections. Nine of these primaries were held prior to April 24. Plaintiff did not win any of these nine primaries. In 8 of these 9 primaries in which delegate votes were awarded, plaintiff received 55 of the 356 delegates awarded, 26 of which were in his home state. This was 28% of the delegates awarded in his home state. Attached hereto as Exhibit G is a chart showing pre-April 22 primary results. The only additional primary prior to April 24 was that of Pennsylvania, in which Anderson was not entered and in which 83 delegates were awarded.

25. Supporters of Plaintiff Anderson for the Republican nomination for President engaged in at least some activity in support of his candidacy in the remaining 14 states which select delegates to the Republic National Convention by caucus or convention.

26. After plaintiff Anderson determined to run for President as an independent on April 24, 1980, his name appeared on the Republican primary ballot for President in twelve states and the District of Columbia. In five states where his name had been scheduled or certified to appear, his name was withdrawn from the ballot prior to the Republican primary election.

27. In order to qualify as a Presidential candidate in the Republican primaries for the states listed below, Plaintiff Anderson had to obtain sufficient signatures on petitions. The signatures were obtained during the time periods indicated in the number indicated and filed on the date indicated.

State	No. of Signatures	Time Period During Which Gathered	Date Filed
New Hampshire	about 1,500	one month	late Dec. 1979
Illinois	about 15,000	one month or less	Dec. 31, 1979
Vermont	about 300	two weeks	Feb. 12, 1980
Indiana	7,517	two weeks	March 7, 1980
Montana	about 4,000	two weeks	March 15, 1980
Ohio	about 7,350	March 13-20, 1980	March 20, 1980

28. Plaintiff Anderson gathered approximately 16,000 signatures in 86 of Ohio's 88 counties during a five-day period from May 10 to May 15, 1980 in an effort to file nominating petitions to run for President as an independent.

29. Ten of the twenty-two persons coordinating plaintiff Anderson's candidacy as an independent for President in Ohio performed similar functions in connection with his Republican candidacy for President in Ohio, including Diane Hetrick who is now his Ohio Coordinator and was his Southern Ohio

Coordinator when he was a Republican candidate, William Massuros who is now his Ohio Field Coordinator and was a Traveling Coordinator when he was a Republican candidate, and Eric Brass who is now a Cincinnati Coordinator and was a Traveling Coordinator when he was a Republican candidate.

30. In 1980, five candidates submitted sufficient signatures, if determined valid, to qualify as independent candidates for President of the United States:

Candidate	No. of Signatures Filed	Date of Filing
Richard E. Congress	11,022	12/18/79
Deirdre Griswold	10,001	3/13/80
Ed Clark	9,944	3/18/80
Gus Hall	9,730	3/19/80
Barry Commoner	10,331	3/20/80

Gus Hall has already been determined not to qualify for the ballot because not one of his certificates of candidacy contained his original signature, and the law requires at least one original signature on a certificate of candidacy.

31. In 1980, two candidates submitted sufficient signatures, if determined valid, to qualify as independent candidates for the United States Senate:

Candidate	No. of Signatures Filed	Date of Filing
John E. Powers	10,475	12/18/79
Rick Nagin	8,080	3/19/80

Rick Nagin has already been determined not to qualify for the ballot because not one of his certificates of candidacy contained his original signature, and the law requires at least one original signature on a certificate of candidacy.

32. In 1978, three independent candidates for the office of Governor filed timely nominating petitions and appeared on the general election ballot in Ohio.

33. In 1976, five independent candidates for President of the United States and three independent candidates for the United States Senate filed timely nominating petitions and appeared on the general election ballot in Ohio.

34. In 1974, one independent candidate for Governor and two independent candidates for the United States Senate filed timely nominating petitions and appeared on the general election ballot in Ohio.

35. In 1978, the number of votes cast for Governor in Ohio was 2,843,351.

36. In 1976, the number of votes cast for President of the United States in Ohio was 4,111,873, and the number of votes cast for United States Senator was 3,920,613.

37. In 1974, the number of votes cast for Governor in Ohio was 3,072,010, and the number of votes cast for United States Senator was 2,987,606.

38. Because records with respect to such matters are not kept and/or because such records cannot easily be obtained and analyzed, it is impossible to determine with any accuracy how many, if any, independent candidates for any office in Ohio either (i) filed and were rejected for any reason, or (ii) were deterred from seeking nomination by petition, through the procedures set forth by state law, in any given prior year.

39. The following is a description of the process through which candidates seeking the nomination of the Republican or Democratic party (or any third party candidate where the party has qualified under Ohio Revised Code Section 3517.01(A)) have their names appear on their respective party primary ballot and how the winners' names, along with the names of independent candidates, are placed upon the general election ballot:

1. Seventy-five days prior to the primary election, all presidential candidates wishing to run as independents in the general election file their nominating petitions with the Secretary of State, while all presidential candidates wishing to

run in a party primary have Declarations of Candidacy in Support of their Candidacy filed with the Secretary of State. The Declaration of Candidacy includes a petition which must be signed by one thousand registered electors who are members of the same political party as the proposed presidential candidate. These requirements are established by Ohio Revised Code Sections 3513.05, 3513.12 and 3513.257.

2. Upon the Secretary of State's receiving the Declarations of Candidacy, the part-petitions are separated by county and mailed to the respective county Boards of Election in order to have the signatures upon the petitions verified. It takes approximately three days to prepare and ship all petitions from the Secretary of State's office.

3. Since the county has to check each signature on every petition, the turnaround time is approximately five to eight working days.

4. The last day to file a Protest against a party candidate is sixty-five days prior to the primary election. Upon receiving a protest, the Secretary of State immediately fixes the time and place for a hearing. Notice of the hearing is sent to the candidate, the individual who filed the protest, and to all other interested parties. The hearing is conducted by the Secretary of State who must determine whether or not the Declaration of Candidacy is valid. His determination is final. Because of the deadlines for certifying the form of the ballot, the hearing and the rendering of a decision on a protest must be completed within two or three days of the filing of the protest.

5. Sixty days prior to the primary election, the Secretary of State is required to certify to the Boards of Elections the form of the official ballots for the primary election. In order to certify the forms of the ballots the Secretary of State's office must get the names of all candidates to the state printer. Since signature verification runs almost to the very day when the ballot form must be prescribed, the Secretary of State anticipates verification and begins work with the state printer

in order to have galley proofs completed on or before the sixty-fifth day prior to the election. Proofing of the galley usually takes two to three working days, while printing of the final copy cannot be completed in less than three days. The entire process of getting the names of the candidates to the state printer, obtaining a galley proof of the proposed ballot, editing it and then having a finished printed sample ballot takes approximately ten working days.

6. During the time that the Secretary of State is certifying the presidential candidates' ballots, the Boards of Elections are obtaining bids from their printers on the proposed ballots. As soon as the official ballot are received from the Secretary of State's office, the Boards begin work on the rotation patterns. Most Boards are able to complete those within one or two days. As soon as a Board completes the rotation pattern, it sends the names of all the candidates within that county to its printer. It takes between eighteen to twenty-two days to receive the completed, printed ballot. The printer must prepare a galley proof and return it to the Board where it is edited. The Boards also sends a copy of the galley to the Secretary of State for his approval. The galley must be checked for correct spelling of all candidate's names, for correct office and title designations, for correct print size and for proper rotation. It is rare when a Board can meet the statutory deadline (forty-five days prior to the election) for the mailing of absentee ballots. Normally absentee ballots are mailed seven to ten days late. It is important at this juncture to note that overseas absentee ballots must be mailed at least thirty days prior to the election in order for the voter to be able to vote the ballot and timely return it.

7. On the day that the ballots are delivered from the printer, a Board immediately begins setting its voting machines. In Franklin County, for example, seven crews are used full-time and they usually complete the tasks one or two days before the election. The voting machines must be pulled and the ballots inserted. The machines then are programmed to the appropriate ballot and the counters are all set back to

zero. The machine is then locked and sealed. Election crews are restricted as to the number of voting machines they can process daily because many machines are stored in public buildings which close at 4:30 to 5:30 p.m. A crew can average fifteen to eighteen machines a day.

8. Immediately after the primary election, the nominating petitions for independent candidates for President and Vice-President are sent to the respective Boards of Elections for signature verification. Normally the petitions are mailed to the various Boards of Election on the Monday or Tuesday after the primary election. As in the case of Declarations of Candidacy, the signature verification process takes approximately five working days. All petitions must be open to inspection from June 15 to June 30. Protest against the nominating petitions may be filed up to and including the 30th day of July.

9. As soon as the names of all Presidential candidates are ascertained, which is no sooner than the completion of the nominating process at the Republican and Democratic national conventions, the official ballot is prepared by the Secretary of State and sent to the State printer. Thereafter, the presidential ballot is mailed to the Boards of Elections. From that time on, the process is identical to that established for the primary.

Attached hereto and incorporated herein as Exhibit H is the Ohio 1980 Election Calendar prepared for public distribution by the Ohio Secretary of State.

Respectfully submitted,

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Exhibit A

Secretary of State
Anthony J. Celebrezze, Jr.

May 16, 1980

BY HAND

Ms. Diana D. Hetrick
National Committee Campaign for
John B. Anderson Committee
25 "K" Street, N.E.
Washington, D.C. 20002

Dear Ms. Hetrick:

This is to advise you that we cannot accept the nominating petitions of John B. Anderson and Frank C. Starr, Jr., as independent candidates for President and Vice-President of the United States respectively, which you tendered today. Ohio Revised Code Section 3513.257 states, in part, as follows:

> Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election . . . shall file no later than four p.m. of the seventy-fifth day before the first Tuesday after the first Monday in June immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in Section 3513.261 of the Revised Code.

The seventy-fifth day prior to the June 3, 1980 primary was March 20, 1980.

Today, May 16, 1980, is the eighteenth day before the first Tuesday after the first Monday in June. Accordingly, your filing is untimely.

You attempted to file, and I rejected, a statement of candidacy and nominating petition consisting of a total of 1710 part-petitions purporting to contain 14,500 signatures from 86 counties. I must also refuse to accept your filing of a slate of Presidential electors sufficient in number to satisfy the requirement of the United States Constitution as it too is untimely. I further cannot accept your tendered payment of $100 as a filing fee for the two candidacies in question.

If you have any questions regarding my decision in this matter, please do not hesitate to contact me.

Sincerely,

Anthony J. Celebrezze, Jr.
Secretary of State

AJC

LJS/r

How Anderson Changes the Race

A TIME *poll shows people want him to run, even if he loses*

For some of the contenders, the campaign of 1980 was a multimillion-dollar enterprise that consumed as much as two years of their lives. For others it was a brief and quixotic fling. Now, with the seemingly endless set of primaries concluding next week, America's increasingly bizarre process for sorting out its presidential candidates is all but over.

President Jimmy Carter's crushing defeat of Senator Edward Kennedy in last week's Oregon primary put him within easy reach of the majority of delegates necessary for his renomination. Carter has already started planning his fall campaign, and last week began looking for ways to get the support of disappointed Kennedy backers. Declared Carter: "It is time to pull the Democratic Party together and to be generous in victory."

Republican Ronald Reagan, despite a lopsided loss to Challenger George Bush in Michigan, won easily in Oregon and was by many counts already in control of more than half of the Republican convention delegates. Said he: "There is a smell of roses in the air. We'd better start planning for the convention and beyond."

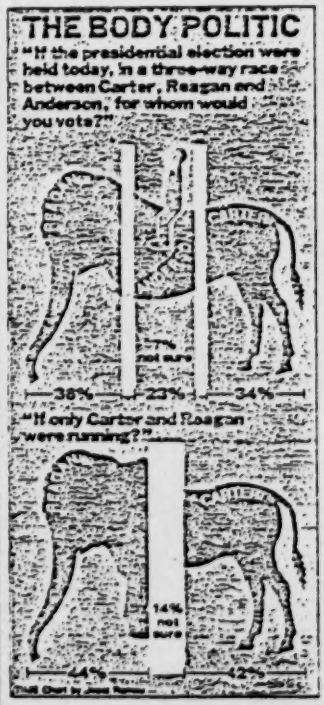
The Third Man. Independent John Anderson, continued his state-by-state efforts to petition his way onto the presidential ballot. His attorneys last week filed suit in Ohio and West Virginia, where they contend that early deadlines or unreasonable requirements deny Anderson access to the ballot. Anderson, buoyed by the fact that he has managed to get onto every state's ballot where deadlines came after his April 24 entry as an independent, said he no longer had any doubts about continuing in the race. "I'm going ahead, and my supporters can feel confident of that."

Thus Campaign 1980 heads into a new and critical phase that at the moment promises a close contest for the presidency. According to the latest national public opinion survey conducted for TIME by Yankelovich, Skelly and White, Inc., none of the three candidates commands a large, devoted following. All three have major handicaps and vulnerabilities.

The survey, conducted among 1,221 registered voters from May 14 to 16,* showed a near standoff between Reagan and Carter, with Anderson still trailing. The percentage figures were Reagan 36, Carter 34, Anderson 23. Since TIME's last survey, in late March, Anderson's total had risen slightly.

With Anderson not included in a presidential runoff, Reagan still leads Carter by the sliver-thin margin of two percentage points, 44 to 42. This means that today Anderson's independent candidacy draws support from both major party candidates in about equal amounts.

Although Anderson still trails both the President and Reagan in the three-way contest by a sizable margin, he has noteworthy areas of strength. Among voters identifying themselves as independents, Anderson actually leads in the race,



edging out Reagan 35% to 34%. Carter trails with this group at 23%. At the same time, Reagan and Carter continue to command the support of their own party members, with Anderson making only minor inroads.

Among all voters in the Northeast, Anderson finishes a close second to Carter (30% to 32%), with Reagan third, only a point behind Anderson. This suggests that the Northeast could be pivotal in the fall election. In the West, often regarded as a Reagan stronghold, the three candidates are also grouped quite closely. Reagan leads with 35%, Anderson is second with 30%, Carter is third with 29%. Reagan appears strongest in the Midwest, and Carter still holds a narrow lead in his native South. Anderson does poorly in both regions and also has little support among blue-collar workers, older voters, blacks and other minority groups.

At this stage of the campaign, however, even this support is subject to quick change. When asked how firmly committed they are to their first choice for President, only 31% of those surveyed say they are "very committed." Fully 30% say they are "not that committed." And when asked who among the three candidates would be their second choice, more voters (31%) choose Anderson than either Carter or Reagan. Among both Democrats and Republicans, about one-third name Anderson as a second choice. That puts him in a good position to pick up disaffected party loyalists who are not attracted by the other party's standard-bearer.

Yet Anderson faces enormous skepticism about the success of his efforts as a presidential candidate. Asked who will actually be the next President, 52% say they expect Carter to be re-elected, while only 30% predict a Reagan victory. Only 1% say Anderson will win. Asked for their reaction to the statement "You don't take Anderson's campaign too seriously, and he doesn't stand a chance of being elected," 59% say they agree. At the same time, only 23% of his supporters say they are strongly committed to him.

No less than 55% continue to express unhappiness with a choice between Reagan and Carter as the nominees of the two major parties. And 64% say they agree with the proposition "You welcome John Anderson's decision to run as an independent, and you think it is good for the country."

Much of the success of Reagan's candidacy will hinge on his choice of a vice-presidential running mate. The Yankelovich survey reveals that the first choice for that slot is George Bush. He is favored by 38% of all voters, while Tennessee Senator Howard Baker runs second, with 24%. Bush leads among all groups, Democrats, Republicans and Independents, and in all regions of the country, including the South.

All the men who are seeking the presidency will be confronted by a corrosive and unhappy public mood that will plague their candidacies. Four out of every five people interviewed continue to say that the country is in "deep and serious trouble." And the array of presidential candidates seems to offer little hope to the electorate. Asked which candidate personally interested or excited them, only 12% of the voters answer this revealing question by saying Reagan, 10% say Anderson, 8% say Kennedy, 6% say Bush, 6% say Carter. The final verdict on which presidential contenders excite Americans: 45% answer "none." ■

*The sampling error in the telephone survey is plus or minus 3%; the error factor for assessing current results with those of past surveys is 1.3%.

Exhibit (11) WEPS 5/14

THE ABC NEWS - HARRIS SURVEY

HOLD for Release: Not before

By Louis Harris

If voters felt convinced that Representative John Anderson had a real chance of winning the presidential election as an independent candidate, the Illinois congressman's national popular vote would swell to a substantial 29 percent, compared with only a slightly higher 31 percent for Jimmy Carter, and 35 percent for Ronald Reagan. In short, Anderson now possesses the potentia of being the first independent to win the White House in American history.

What is more, the key to the Anderson strength can be found in the type of support he can potentially attract if he is seen to have a real chance of winning. In the 8 largest states of the North, which account for 216 of the 269 electoral votes necessary to elect, Anderson comes out ahead with 36 percent of the vote, followed by Carter at 31 percent, and Reagan at 29 percent. In addition, in the East, Anderson would finish on top with 38 percent of the vote, with Carter second at 34 percent, and Reagan at 24 percent. And in the West, Anderson would give Reagan a real run for top honors, finishing with 34 percent of the vote, just behind Reagan's 38 percent, but well ahead of the 22 percent for President Carter as the Democratic nominee.

C O N T I N U E D

pairings

The key to this spectacular potential for Anderson, however, is the assumption that "the polls showed he had a real chance of winning the presidential election in November." The Illinois Republican has been exploring his chances of both getting on the ballots as an independent in as many of the 50 states as possible and also of raising enough money to make a real run of it. Under the law, as a true independent, Anderson will not be entitled to any federal funds before the general election in November. His Democratic and Republican opponents will each automatically receive as much as $29 million from the federal Treasury under the IRS check-off provisions of the law, once they are nominated.

Despite this real potential shown by John Anderson, he is not yet in such a formidable position in a three way race. At the moment, the latest ABC News - Harris Survey of 1,190 likely voters taken from April 26th to 30th, shows Reagan ahead with 39 percent, Carter second at 33 percent, and Anderson at 23 percent. In the pivotal 8 big states of the north, John Anderson takes 29 percent of the vote, compared with 32 percent for Carter, and 34 percent for Reagan.

The base on which Anderson can build to his indicated potential not only includes the big northern industrial states, but also these key segments of the electorate:

C O N T I N U E D

pairings

--Among young people 18-29, Anderson now has 31 percent of the vote, Carter 32 percent, and Reagan 34 percent. However, if Anderson were seen by this group as having a real chance, his vote would rise to 38 percent, with Carter at 31 percent, and Reagan dropping to 28 percent. Indeed, as with other key groups, Anderson's potential is now more likely to come from Reagan than from Carter votes on the whole.

--Among professional types, Anderson now has 36 percent of the vote, Reagan a slightly higher 37 percent, while Carter is at 23 percent. However, if given a real chance of winning, Anderson's total would swell to 39 percent, ahead of 35 percent for Reagan and 22 percent for Carter.

--Among Jewish voters, Anderson now is winning 56 percent of their vote, compared with only 23 percent for Carter and 19 percent for Reagan. If given a real chance for victory, Anderson's Jewish backing would jump to 64 percent, with Carter at 19 percent and Reagan at 16 percent.

--Among independent voters, Anderson now is winning 33 percent, Reagan a higher 40 percent, with Carter at 22 percent. But, if thought to have a real chance of winning, Anderson's vote goes up to 38 percent of the independent voters, Reagan to 35 percent, and Carter at 23 percent.

C O N T I N U E D

pairings

--Among liberal voters, Anderson now has 33 percent of the vote, with Carter at a higher 46 percent, and Reagan trailing with 19 percent. But, if given a real chance of winning, Anderson could rise to 39 percent of the liberals, with Carter a still higher 41 percent, and Reagan at 17 percent.

--Among middle of the road voters, Anderson now is getting 26 percent of the vote, with Carter a higher 32 percent, and Reagan in the lead with 37 percent. But, given a real chance of winning, Anderson goes up to 33 percent of the middle of the road vote, followed by Carter at 32 percent, and Reagan at 31 percent.

These early tests can only lead to the conclusion that the uprooted electorate of 1980 is perfectly capable of electing an independent such as John Anderson to the White House. However, he must be able to overcome the distinct handicaps of getting on the ballots in most states and finding a way of financing his run. And these are not easy impediments, given the law as now constituted.

T A B L E S

Between April 26th and 30th, the ABC News - Harris Survey asked a cross section of 1,190 likely voters nationwide by telephone:

C O N T I N U E D

pairings

"Suppose for President next November it is between Ronald Reagan for the Republicans, Jimmy Carter for the Democrats, and Representative John Anderson of Illinois as an independent. If you had to choose right now, would you vote for Reagan, Carter, or Anderson?"

REAGAN/CARTER/ANDERSON IN 1980

	April 26th-30th	April 25th	March 26th-30th
	%	%	%
Reagan	39	42	38
Carter	33	33	38
Anderson	23	19	22
None (vol.)	2	2	X
Not sure	3	4	2

X = not asked

"Now, suppose the polls showed that John Anderson had a real chance of winning the presidential election in November. If you had to choose right now, would you vote for Reagan the Republican, Carter the Democrat, or Anderson the independent?"

REAGAN/CARTER/ANDERSON IF ANDERSON STOOD REAL CHANCE OF WINNING

	%
Reagan	35
Carter	31
Anderson	29
None (vol.)	2
Not sure	3

C O N T I N U E D

REAGAN/CARTER/ANDERSON IF ANDERSON STOOD REAL CHANCE OF WINNING CONT'D.

	If Anderson stands real chance of winning									
	RR %	JC %	JA %	None %	Not sure %	RR %	JC %	JA %	None %	Not sure %
DEMOGRAPHICS										
Total voters	39	33	23	2	3	35	31	29	2	3
East	30	35	29	1	5	24	34	38	1	3
Midwest	41	29	27	2	1	36	28	33	1	2
South	43	41	13	1	2	38	22	34	2	4
West	43	25	26	2	4	38	22	34	2	4
Age										
18-29	34	32	31	*	3	28	31	38	1	2
30-49	37	34	22	2	5	36	31	27	2	4
50-64	42	31	22	2	3	39	29	28	1	3
65 and over	42	39	16	2	1	38	37	21	2	2
Professionals	37	23	36	1	3	35	22	39	1	3
Executives	43	27	26	1	3	36	26	34	-	4
Proprietors	62	23	11	-	4	51	21	27	1	-
Skilled labor	33	43	17	2	5	32	39	23	2	4
White collar	37	28	26	3	6	33	28	30	3	6
White Protestant	47	30	18	1	4	43	28	24	*	5
White Catholic	38	35	22	2	3	35	36	26	2	1
Jewish	19	23	56	-	2	16	19	64	-	1
Republican	64	14	17	2	3	60	11	24	2	3
Democrat	23	51	22	1	3	20	48	29	1	2
Independent	40	22	33	1	4	35	23	38	1	3
Conservative	52	29	16	1	2	50	26	21	1	2
Middle of the road	37	32	26	2	3	31	21	33	1	3
Liberal	19	46	33	*	2	17	41	39	1	2
**8 largest northern states	34	32	29	2	3	29	31	36	1	3

* = less than 0.5 percent
\- = no response

**The 8 largest northern states are: California, New York, Illinois, Pennsylvania, Ohio, Michigan, New Jersey, Massachusetts.

W YORK TIMES, SUNDAY, JUNE 1, 19

Exhibit D

Section A

Associated Press

. Kennedy being greeted by Rabbi Isaiah Zeldin as he ar- n Wise Temple in Los Angeles for a campaign appearance.

California Voter Apathy Threatens Kennedy's Strategy for Nomination

By HEDRICK SMITH

Special to The New York Times

LOS ANGELES, May 31 — California's 10 million registered voters, who have often swung their weight decisively in Presidential races, appear to feel that they do not matter to this year's nominations, and that attitude threatens to foil Senator Edward M. Kennedy's bid for an upset over President Carter.

With Mr. Carter only 24 delegates short of a nominating majority and assured of winning that many in eight states on Tuesday, Mr. Kennedy has said he must win California, the biggest in that final round of primaries, to keep alive his hopes of blocking Mr. Carter's renomination.

The Massachusetts Democrat, who campaigned last night and today in Los Angeles at a synagogue and a senior citizens' center and met with black ministers, has been stumping vigorously and directing increasingly strident attacks at Mr. Carter.

Nonetheless, opinion polls and politicians in California say that he is running about even, at best, with Mr. Carter. Even those who think he may eke out a victory here believe that it will be too slim to shatter and unravel the delegate support that Mr. Carter has already accumulated, which is what the Kennedy forces are hoping for.

Last Chance in 'Final Wave'

"It looks close, and Kennedy would have to win big in the final wave to prove to the Democratic Party that the tide is turning against Carter," said Marvin D. Field, the California pollster. "If it's close, it's just going to be academic."

Normally, the largely liberal California Democratic Party would be fertile ground for Senator Kennedy, especially when the nation's economy is faltering. But politicians believe that the economic downturn this year came too late to help Mr. Kennedy, and most voters have been indifferent to his campaign here because they regard the Democratic nominating battle as essentially over. Many politicians talk of the Presidential primary as "a nonevent," despite the 326 delegates contested, that is far overshadowed by local races and public initiatives on the ballot.

"It's been many years since I've seen the level of interest in a Presidential race this low," said Leo McCarthy, the State Assembly Speaker. "Kennedy has done well on his trips here, but the assumption that the race for the nomination is over has a pervasive and dampening effect. There's no grass-roots excitement for anyone, and that apathy is going to hurt Kennedy. I think Carter will win in a close race."

The mid-May opinion poll published by the Field [illegible] Mr. Carter and Senator [illegible] a narrow lead in April. But the most surprising result, Mr. Field [illegible] noted, was that the number of undecided voters had jumped from 10 percent [illegible]

recent polls have shown the President ahead by a few points.

The huge undecided category has not only made the outcome impossible to predict, but it also has many politicians speculating that California may follow the pattern of Nevada, Texas, Arkansas, Tennessee and North Carolina, where substantial numbers of Democrats rejected both Mr. Carter and Mr. Kennedy. The California ballot does offer an "uncommitted slate," as well as Gov. Edmund G. Brown Jr., who is still listed despite his withdrawal from the race and received 7 percent in the May Field poll.

In seeking to arouse voter interest, Mr. Kennedy has repeatedly called for a debate with Mr. Carter. Yesterday in Sacramento he accused the Carter Administration of providing "the worst Presidential leadership in half a century" and leading the country into "the worst recession since the great depression."

Earlier, he warned that Mr. Carter might run third next fall, behind Ronald Reagan, the expected Republican nominee, and Representative John B. Anderson of Illinois, the independent candidate. Indeed, the Field poll in mid-May showed Mr. Reagan favored by 39 percent of Californians, with 28 percent for Mr. Carter and 25 percent for Mr. Anderson.

Even Mr. Kennedy's own campaign workers acknowledge the difficulty of overcoming apathy. "Our voter, the Kennedy voter, is enthusiastic, but you need more than that in California," said Oren Teicher, field director of the Kennedy campaign in the state. "Politics in Los Angeles is a page 28 story. It's a nonevent I just don't think people are paying attention."

Moreover, the Kennedy campaign has been crippled by lack of funds. It has had no money for big direct mail operations, large phone banks or major canvassing to get out the vote.

In addition, only $195,000 has been budgeted for the Senator's one week of television and radio advertising. Most politicians regard that sum as a pittance for a statewide race, especially at the Presidential level, and say that a candidate needs at least $1 million.

The Carter campaign is spending $250,000 to $265,000 on advertising, which the campaign chairman, former State Party Leader Charles Manatt, says is intended for areas of expected strength — San Diego, Orange County south of Los Angeles, Sacramento and the San Joaquin Valley of central California, and areas east of Los Angeles like Riverside and San Bernadino.

To offset this Carter strength, the Kennedy campaign is counting on a good lead from Oakland, Berkeley and the San Francisco Bay area.

By far the richest and most sharply contested area is Los Angeles County, which has 43 percent of the state's Democratic voters and which Senator Kennedy must carry by a considerable margin to win statewide, according to most politi-

t Now Praises Kennedy ers Platform Concessions

Page 1

[illegible] behind in [illegible] month, and the [illegible] is now considered [illegible] boredom with the [illegible] listening the chal-

[illegible] Jersey's 113 dele- [illegible] be close. The [illegible] ed to be more a [illegible] n of any political [illegible] reception that the [illegible] is over is hinder-

[illegible] achieving unity [illegible] that comes after [illegible] in Rhode Island, [illegible] Florida, [illegible] Mr. Carter made [illegible] ots.

[illegible] noted that the [illegible] ate the issues [illegible] the party, and [illegible] Mr. Kennedy [illegible] that [illegible] [illegible] [illegible]

[illegible] POLL
BY EVANS WITT

NEW YORK (AP) -- PRESIDENT CARTER FACES MAJOR PROBLEMS AMONG DEMOCRATIC VOTERS IN NEW JERSEY, CALIFORNIA AND OHIO, THREE STATES HE PROBABLY NEEDS TO WIN FOR ANOTHER TERM IN THE WHITE HOUSE, ASSOCIATED PRESS-NBC NEWS POLLS SAY.

MANY DEMOCRATIC PRIMARY VOTERS IN THOSE STATES WERE UNHAPPY WITH THE CHOICE BETWEEN CARTER AND SEN. EDWARD M. KENNEDY IN TUESDAY'S PRIMARIES, WHICH PUSHED CARTER PAST THE NUMBER OF DELEGATES NEEDED FOR NOMINATION. THAT DISSATIFICATION COULD TRANSLATE INTO DEFECTIONS FROM CARTER IN NOVEMBER.

IN CALIFORNIA AND NEW JERSEY -- WHICH CARTER LOST TO KENNEDY -- ONLY ABOUT A THIRD OF THE DEMOCRATIC PRIMARY VOTERS SAID THEY PLAN TO VOTE FOR CARTER IN NOVEMBER, INTERVIEWS WITH VOTERS OUTSIDE PRECINCTS ON TUESDAY FOUND.

HE DID A LITTLE BETTER IN OHIO, WHICH HE WON. BUT EVEN THERE, CARTER DOES NOT NOW HAVE THE ALLEGIANCE OF A MAJORITY FOR NOVEMBER.

JOHN ANDERSON, TRYING TO BECOME THE FIRST INDEPENDENT CANDIDATE TO WIN THE WHITE HOUSE, IS THE MAJOR BENEFICIARY OF THE DEMOCRATIC DEFECTIONS. BUT RONALD REAGAN ALSO PICKS UP SIGNIFICANT SUPPORT -- PARTICULARLY AMONG CONSERVATIVE DEMOCRATIC PRIMARY VOTERS.

ANDERSON MUST QUALIFY FOR THE GENERAL ELECTION BALLOTS IN CALIFORNIA AND OHIO EVEN TO BE ELIGIBLE FOR THEIR VOTES.

BUT THE AP-NBC NEWS POLLS DEMONSTRATE CARTER FACES MAJOR PROBLEMS AS HE BIDS FOR FOUR MORE YEARS.

IN EACH STATE, DEMOCRATIC VOTERS WERE ASKED WHOM THEY WOULD VOTE FOR IN NOVEMBER IN A RACE AMONG CARTER, ANDERSON AND REAGAN. HERE'S WHAT THEY SAID:

CALIFORNIA: THIRTY-FOUR PERCENT SAID CARTER; 23 PERCENT ANDERSON; 19 PERCENT, REAGAN; 24 PERCENT SAID SOMEONE ELSE OR WERE NOT SURE, INTERVIEWS WITH 2,128 VOTERS SHOWED.

NEW JERSEY: CARTER WAS THE CHOICE OF 32 PERCENT; ANDERSON 24 PERCENT; REAGAN 16 PERCENT; AND 28 PERCENT NAMED SOMEONE ELSE OR WERE NOT SURE, ACCORDING TO INTERVIEWS WITH 2,178 VOTERS FOUND.

OHIO: FORTY-SEVEN PERCENT PICKED CARTER; 16 PERCENT NAMED ANDERSON; 15 PERCENT REAGAN; AND 20 PERCENT GAVE ANOTHER ANSWER, INTERVIEWS WITH 2,307 VOTERS THERE FOUND.

ASKED HOW STRONGLY THEY SUPPORTED THE MAN THEY VOTED FOR, ABOUT TWO OUT OF FIVE OF THE DEMOCRATIC VOTERS IN ALL THREE STATES SAID THEY WISHED THEY HAD OTHER CHOICES, BUT VOTED FOR CARTER OR KENNEDY ANYWAY, THE POLLS SAID.

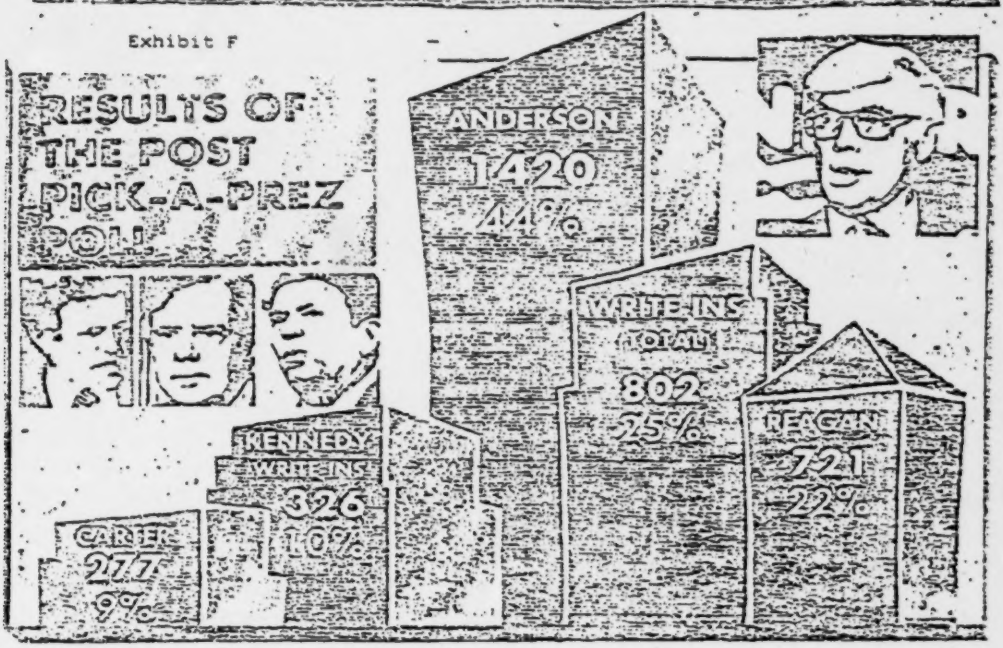
IN NEW JERSEY, 40 PERCENT OF THE DEMOCRATS SAID THEY WERE STRONG SUPPORTERS OF THEIR CANDIDATE, WHILE 21 PERCENT SAID THEY WERE ONLY WEAK SUPPORTERS.

IN OHIO, 37 PERCENT WERE STRONG SUPPORTERS AND 25 PERCENT WERE NOT SO STRONG.

IN CALIFORNIA, ONLY 31 PERCENT SAID THEY STRONGLY BACKED THEIR CANDIDATE AND 26 PERCENT SAID THEY HAD SOME RESERVATIONS ABOUT THE CANDIDATE. THE REST IN EACH CASE WERE NOT SURE.

AP-WX-0604 1028EDT

Post readers say who they'd like to see in the White House



It's Andy — by a handy 5-1 margin over the Prez

By BARBARA ROSS

THE Post pick-a-President poll has independent John Anderson running first in New York — whipping Jimmy Carter 5 to 1 and comfortably ahead of GOP nominee-apparent Ronald Reagan.

Carter runs a distant third in The Post reader poll, winning fewer than 10 per cent of the ballots — a clear warning sign since New York is a crucial state for his reelection.

In fact, Carter is doing worse than Democratic rival Ted Kennedy — even though readers had to take the trouble to write in Kennedy's name on the pick-a-President ballot.

The poll found no groundswell whatsoever for Vice President Mondale, the man some Democratic leaders would like to see replace Carter as the nominee.

Mondale got just nine ballots — the same as Betty Boop. Nor was there a groundswell for any other Democrat except Kennedy.

The Post asked readers to sound off about next fall's likely choice between Anderson, Carter and Reagan by saying whether they'd vote for one of the three — or none of the above.

Anger was a dominant theme.

"The major parties have disintegrated pathetically and are offering us unacceptable incompetents," one Anderson backer grumbled.

"I am a Democrat — but an independent one — and I demand a choice, not Tweedledum or Tweedledee!"

Another typed in, "For the devil, but not for Carter."

And readers vented their frustrated sense that politics is the art of the absurd by picking Woody Allen, Miss Piggy and Pogo ("he likes to fish and an alligator for vice president isn't too bad").

One reader left the entire ballot blank and simply wrote: "It's pretty scary."

The poll is not a scientific survey since readers angered by the available choices are most likely to respond.

But it does offer yet another sign that Carter is in trouble and Anderson is a candidate to be taken seriously.

The Democratic National Committee has recognized that fact by putting aside $125,000 to knock him off the ballot, despite White House claims that Anderson's candidacy is just a "fantasy."

The poll began May 17.

A total of 3247 readers cast their votes. Here's how their choices in the Presidential sweepstakes went:

- Anderson: 1420 or 44 per cent.
- Reagan: 721 or 22 per cent.
- Kennedy write-ins: 326 or 10 per cent.
- Carter: 277 or 9 per cent.
- Write-ins (total): 802 or 25 per cent.

Among the Democrats who picked up write-in votes were Sens. Henry Jackson and Pat Moynihan and Secretary of State Muskie, but each got only a handful of votes.

After Kennedy, the write-in candidate with the most votes was Barry Commoner — followed by ousted President Nixon and former President Ford.

EXHIBIT G

Popular Vote and Delegates

	Democratic candidates	Popular vote	Pct. of vote	Pct. of delegates	Republican candidates	Popular vote	Pct. of vote	Pct. of delegates	No. of delegates
Alabama	Carter	190,003	82	93	Reagan	146,041	70	87	18
	Kennedy	31,344	13	4	Bush	50,232	25	33	9
	Other	12,079	5	0	Anderson	0	0	0	
					Other	9,527	4	0	
Connecticut	Carter	87,207	41	46	Reagan	61,735	34	43	14
	Kennedy	93,662	47	54	Bush	70,387	39	43	16
	Other	24,406	12	0	Anderson	40,354	22	17	5
					Other	9,828	5	0	
Florida	Carter	655,366	61	74	Reagan	342,960	57	100	51
	Kennedy	231,421	23	25	Bush	151,855	30	0	
	Other	173,219	16	1	Anderson	82,928	9	0	
					Other	22,994	4	~0	
Georgia	Carter	328,329	65	98	Reagan	146,332	73	100	36
	Kennedy	33,422	9	2	Bush	35,253	13	0	
	Other	14,217	3	0	Anderson	17,536	9	0	
					Other	11,704	5	0	
Illinois	Carter	758,455	65	92	Reagan	535,204	43	45	80
	Kennedy	349,395	30	8	Bush	122,532	11	2	
	Other	57,830	5	0	Anderson	412,279	37	28	26
					Other	42,217	4	15	
Kansas	Carter	108,831	57	61	Reagan	177,998	63	63	22
	Kennedy	60,549	32	39	Bush	33,400	13	12	3
	Other	22,784	11	0	Anderson	51,423	18	16	5
					Other	17,750	6	9	
Louisiana	Carter	199,221	55	76	Reagan	31,255	74	94	28
	Kennedy	80,594	22	24	Bush	8,065	19	0	
	Other	78,567	22	0	Anderson	0	0	0	2
					Other	3,078	7	5	
Massachusetts	Carter	260,069	29	31	Reagan	115,200	29	31	13
	Kennedy	585,537	65	69	Bush	124,239	31	33	14
	Other	51,006	6	0	Anderson	123,055	31	31	13
					Other	37,135	9	5	2
New Hampshire	Carter	53,380	49	53	Reagan	72,940	50	63	15
	Kennedy	41,540	38	47	Bush	33,471	23	33	5
	Other	13,702	13	0	Anderson	14,706	10	0	
					Other	24,529	17	9	2
New York *	Carter	379,062	41	42					
	Kennedy	574,096	59	58					
	Other	0	0	0					
South Carolina †					Reagan	78,854	54	100	25
					Bush	21,455	15	0	
					Anderson	0	0	0	
					Other	44,304	32	0	
Vermont ‡	Carter	28,708	74		Reagan	19,513	31		
	Kennedy	9,913	26		Bush	14,134	23		
	Other	0	0		Anderson	18,844	30		
					Other	10,272	16		
Wisconsin	Carter	548,518	56	64	Reagan	360,314	40	82	28
	Kennedy	187,109	30	35	Bush	274,353	31	0	
	Other	83,241	14	1	Anderson	242,879	28	18	6
					Other	13,734	1	0	
Puerto Rico	Carter	446,712	52	51	Reagan	50	0	0	
	Kennedy	416,103	48	49	Bush	122,217	59	100	14
	Other	2,123	0	0	Anderson	0	0	0	
					Other	85,007	41	0	
TOTALS	Carter	3,673,573	54	63	Reagan	2,041,937	47	65	
	Kennedy	2,729,375	39	37	Bush	1,007,512	24	14	
	Other	535,171	8	0	Anderson	981,234	22	13	
					Other	335,175	7	7	

* In the New York Republican primary, only delegates appeared on the ballot. There was no popular vote for the candidates. † In South Carolina, the Democrats did not hold a primary. Delegates are chosen by caucus. ‡ In Vermont, no Republican candidate achieved 10 percent of the popular vote, the minimum necessary. By the state party's rules, 19 will delegates. Delegates will be elected at a state convention. The Democratic contest was completely unpledged and delegates will be elected at a state convention.

Offices on the Ballot In 1980

Offices elected throughout the state:

President and Vice President
U.S. Senator
Chief Justice of the Ohio Supreme Court
Justice of the Ohio Supreme Court (2)

District offices:

Representatives to Congress (all 23 districts)
State Senators (16 even-numbered districts)
State Representatives (all 99 districts)
Court of Appeals Judges (one full term to be elected in each Appellate District)
Members of the State Board of Education (districts 2, 3, 6, 8, 18, 20, 23)

County offices:

Commissioner in each county (2)
Prosecuting Attorney
Sheriff
Recorder
Coroner
Treasurer
Clerk of Courts
Engineer
Common Pleas Judge (some counties)
County Court Judge (some counties)
Unexpired terms for some offices

Voters will also be electing at the Primary Election:

Delegates and Alternates (to the National Conventions of the major political parties)

Members of the State Central Committee and the County Central Committee (of the respective political parties)

er registration closes
Primary Election — May 4

mary Election Day — June 3

er registration closes
General Election — October 5

neral Election Day — November 4

1980 Election Calendar

Jan 1	**Applications for Armed Service Absentee Ballots are not valid if dated, postmarked, or received by the Board of Elections before this date.**	**R.C. 3511.02**
March 5	**Last day for filing Local Option Petitions, Bond Issue Resolutions and Constitutional Amendments submitted by the Legislature to be voted on at the Primary, by 4:00 p.m.**	**R.C. 4301.33 133.09 3501.02 (E)**
	First day that application for Absentee Ballots may be made by civilians within the U.S., until 3 days before the election (90 days prior to the election)	**R.C. 3509.03**
March 20	**Last day for filing a Declaration of Candidacy for party candidates, Nominating Petitions for independent candidates (except Judge of the County Court and members of the State Board of Education), and Tax Levy Resolutions to be voted on at the Primary, by 4:00 p.m. (75 days prior to the election)**	**R.C. 3513.05 3513.257 3513.259 1907.051 5705.191**
March 25	**Last day that Party Primary Petitions are open for public inspection, until 4:00 p.m. (70 days prior to the election)**	**R.C. 3513.05**
March 30	**Last day for a party candidate who filed a Declaration of Candidacy to withdraw, by 4:00 p.m. (65 days prior to the election)**	**R.C. 3513.30**
March 30	**Last day to file protests against any party candidate filing a Declaration of Candidacy, by 4:00 p.m. (65 days prior to the election)**	**R.C. 3513.05**
April 4	**Secretary of State shall certify to the Boards of Elections the forms of official ballots for the Primary Election (60 days prior to the election)**	**R.C. 3513.05**
April 19	**First day Absentee Ballots are available Boards of Elections should mail Armed Service Absentee Ballots (45 days prior to the election)**	**R.C. 3509.01 3511.04**
April 24	**Last day for a Write-in Candidate to file a Declaration of Intent to be a write-in candidate (40 days prior to the election)**	**R.C. 3513.041**
May 4	**Last day to Register to be eligible to vote at the Primary Election (30 days prior to the election)**	**R.C. 3503.11**
	Last day for candidates for Delegates or Alternates to the National Convention to withdraw, by 4:00 p.m. (30 days prior to the election)	**R.C. 3513.30**
May 22	**Last day for Pre-Election Campaign Expense Reports, by 4:00 p.m. (10 days prior to the election)**	**R.C. 3517.10**
May 23	**Last day for Political Parties, Committees, or Groups appointing Challengers or Witnesses to notify the Board of Elections of the names and addresses of their appointees, by 4:00 p.m. (11 days prior to the election)**	**R.C. 3505.21**
May 24	**Names of candidates for state and district office shall not appear on the Primary ballot if candidate dies before this date (10 days prior to the election)**	**R.C. 3513.17**
May 29	**Names of candidates for county, district, or subdivision shall not appear on the Primary ballot if candidate dies before this date (5 days prior to the election)**	**R.C. 3513.17**
May 31	**Last day for applications for Absentee Ballots for the Primary Election to be received by the Director of the Board of Elections, by 12 noon (3 days prior to the election)**	**R.C. 3509.03 3509.08 3511.02 3511.04**
June 2	**Last day for filing Amendments to the list of Challengers and Witness Appointments with the Director of the Board of Elections, by 4:00 p.m.**	**R.C. 3505.21**
	Judges may meet at 7:00 p.m. and remain open until 7:30 p.m. At such meeting any elector may appear and challenge the right of any person to vote (1 day prior to the election)	**R.C. 3501.31**
June 3	**Primary Election Day**	**R.C. 3501.01**
	Last day for Absentee Ballots to be returned to the Director of the Board of Elections, by the close of the polls, at 7:30 p.m.	**R.C. 3509.05 3511.11**
	Last day for Absentee Voters Hospitalized because of accident or unforeseen medical emergency occurring not more than 6 days before the election, to apply for Absentee Ballots, by 3:00 p.m.	**R.C. 3509.08**
June [illegible]	**First day that Nominating Petitions for independent candidates, submitted to the Board of Elections by March 20th, will be open for public inspection, until June 30th at 4:00 p.m.**	**R.C. 3513.262**
July 15	**Last day for Board of Elections to certify Nominating Petitions filed March 20th**	**R.C. 3513.262**
July 18	**Last day for filing Post Election Campaign Finance Reports, by 4:00 p.m. (45 days after primary election)**	**R.C. 3517.10**
July 30	**Last day for any qualified elector eligible to vote to file written protest [illegible]**	**R.C. 3513.262**

	Applications for absentee ballots for the County Court and members of the State Board of Education to be filed by 4:00 p.m.	
	Last day for filing Local Option Petitions, Initiative and Referendum Petitions, and Constitutional Amendments (Some deadlines are 4:00 p.m.)	R.C. 4301.33 Ohio Constitution Article II, Sec 1
	First day that applications for Absentee Ballots may be made by electors within the U.S., until 3 days before the election (40 days prior to the election)	R.C. 3509.03
Aug 11	First day that Nominating Petitions for State Board of Education and County Judges, submitted to the appropriate Board of Elections, will be open for inspection until 4:00 p.m. (85 days prior to the election)	R.C. 3513.263
Aug 12	Last day for Board of Elections to certify the signatures of Nominating Petitions for State Board of Education and County Judges (81 days prior to the election)	R.C. 3513.263
Aug 16	Last day for a Candidate Nominated at the Primary Election to withdraw for which a replacement may be named	R.C. 3513.31
	Last day to file protests of Nominating Petitions for State Board of Education and County Judges (80 days prior to the election)	R.C. 3513.263
Aug 20	Last day for nomination to be made of the person selected to fill the vacancy of a withdrawn candidate (76 days prior to the election)	R.C. 3513.31
Aug 31	Last day for a withdrawal of a candidate for the next General Election (65 days prior to the election)	R.C. 3513.30
Sept 5	Secretary of State shall certify to the Boards of Elections the forms of official ballots for the General Election (60 days prior to the election)	R.C. 3505.01
Sept 20	First day Absentee Ballots are available	R.C. 3509.01
	Boards of Elections should mail Armed Service Absentee Ballots (45 days prior to the election)	R.C. 3511.04
Sept 25	Last day for Write-in Candidates in the General Election to file a Declaration of Intent to be a write-in candidate, by 4:00 p.m. (40 days prior to the election)	R.C. 3513.041
Oct 5	Last day to register to be eligible to vote in the General Election, by 4:00 p.m. (31 days prior to the election)	R.C. 3503.11
	Last day to Vote a Presidential Ballot in Ohio, by 4:00 p.m. (30 days prior to the election)	
Oct 21	Last day for Pre-Election Campaign Expense Reports for the General Election to be filed by 4:00 p.m. (12 days prior to the election)	R.C. 3517.10
Oct 24	Last day for Political Parties, Committees, and Groups appointing watchers and challengers to notify the Board of Elections of the names and addresses of their appointees (11 days prior to the election)	R.C. 3505.21
Oct 25	Last day to file a certificate to fill vacancy on ballot caused by death of candidate nominated at the Primary Election, by 4:00 p.m. (10 days prior to the election)	R.C. 3513.31
Oct 30	Last day to file certificate to fill vacancy on the ballot caused by death of an independent candidate, by 4:00 p.m. (5 days prior to the election)	R.C. 3513.31
Nov 1	Last day for applications for Absentee Ballots for the General Election to be received by the Director of the Board of Elections, by 12 noon (3 days prior to the election)	R.C. 3509.03 3509.08 3511.02 3511.04
Nov 3	Last day for filing Amendments to the Witness and Challenger Appointments with the Director of the Board of Elections, by 4:00 p.m.	R.C. 3505.21
	Judges may meet at 7:00 p.m. and remain open until 7:30 p.m. At such meeting any elector may appear and challenge the right of any person to vote (1 day prior to election)	R.C. 3501.31
Nov 4	**General Election Day**	R.C. 3501.01
	Last day for Absentee Ballots to be returned to the Director of the Board of Elections, by the close of the polls at 7:30 p.m.	R.C. 3505.15 3511
	Last day for Absentee Voters Hospitalized because of accident or unforeseen medical emergency occurring not more than 6 days before the election to apply for Absentee Ballots, by 3:00 p.m.	R.C. 3509.08
Nov 26	Last day for filing Annual Campaign Finance Reports, by 4:00 p.m. (Does not need to be filed with any office where a post election report will be filed on Dec 19 1980.) (Filed last business day of November of each year)	R.C. 3517.10
Dec 19	Last day for filing Post Election Campaign Finance Reports, by 4:00 p.m. (45 days after the election)	R.C. 3517.10

1980 Election Calendar

Anthony J. Celebrezze, Jr.
Secretary of State
30 East Broad Street
14th Floor
Columbus, Ohio 43266

614/466-2535

Bradley v. Mandel
(unreported opinion)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. T 76-638

(Argued: May 12, 1976 Decided:)

BRUCE BRADLEY, JOHN F. FALCONER, JOHN MCGRATH, GLORIA FAZIO, PAUL POFF,
Plaintiffs,

—v.—

HONORABLE MARVIN MANDEL, FRANCIS B. BURCH, Attorney General, WILLARD A. MORRIS, Administrator, State Administrative Board of Election Laws, REGINALD A. ASPLEN, Chairman, State Administrative Board of Election Laws, THEODORE N. CLARK, Vice Chairman, State Administrative Board of Election Laws, ANN SCHISSLER, State Administrative Board of Election Laws, JAMES W. JOHNSON, JR., State Administrative Board of Election Laws, STEPHEN R. FEGAN, State Administrative Board of Election Laws,

Defendants.

Before:

WINTER, *Circuit Judge,*
THOMSEN, *Senior District Judge,*
and KAUFMAN, *District Judge.*

JON T. BROWN, Esquire, JAMES D. PEMBROKE, ESQUIRE, and DUNCAN, BROWN, WEINBERG & PALMER, *Attorneys for Plaintiff*;

FRANCIS B. BURCH, Esquire, Attorney General for the State of Maryland, ROBERT A. ZARNOCH, Esquire, GEORGE NILSON, Esquire, Assistant Attorneys General for the State of Maryland, *Attorneys for Defendants.*

WINTER, *Circuit Judge:*

Maryland permits the selection of candidates at a general election for statewide and federal offices by either of two methods: by primary elections by political parties whose status as political parties has been theretofore established, and by nominating petition. § 4-1.[1] Primary elections are fixed by Maryland law to be held on the second Tuesday after the first Monday in September in any year in which there shall *not* be an election for President and Vice President. In any year in which there *shall* be an election for President and Vice President, the primary election shall be held on the third Tuesday in May. § 5-2. When a candidate who is registered as an independent, or who is a member of or affiliated with a partisan organization which is not a political party or is not a member of a political party whose nominees must be nominated by primary election, seeks nomination by petition, he is required to file a certificate of candidacy together with nominating petitions signed by no less than three percent of the registered voters who are eligible to vote for the office for which he seeks nomination. § 7-1. His nominating petitions must be delivered to the Boards of Elections Supervisors for the counties, or Baltimore City, in which the signers on the

1 The Maryland election laws are codified in Art. 33, 3B Ann. Code of Md. (1976). All section references made herein will be to Art. 33 unless otherwise indicated.

paper are alleged to reside "not later than 9:00 p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election shall be held under the primary election law . . . ." § 7-1(e). A person seeking nomination in a primary election is similarly required to file a certificate of candidacy for nomination "not later than nine p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election shall be held under the primary election law," § 4A-3, but he may withdraw his candidacy up to 45 days before the primary. § 9-1.

The net effect of these provisions in the 1976 presidential election year is that candidates for nomination, whether by the primary election route or by the petition route, must have filed their certificates of candidacy by March 8, 1976. A candidate seeking nomination by the petition route must have also filed nominating petitions containing the requisite number of signatures by March 8, 1976. A candidate by the primary route had the right to withdraw his certificate of candidacy until April 2, 1976. The primary election will be held on May 18, 1976, and the general election will be held on November 2, 1976. Md. Const. Art. XV § 7.

I.

Plaintiff Bruce Bradley is an independent candidate for the United States Senate from the State of Maryland. The remaining plaintiffs are citizens of and registered voters in the State of Maryland who wish to have the name of Bruce Bradley placed upon the ballot for the Maryland general election to be held November 2, 1976. Defendants are various election officials of the State of Maryland. The facts which give rise to this litigation follow:

On March 8, 1976, Bradley filed nominating petitions with twenty-one county election boards in the State of Maryland, including the City of Baltimore. The petitions were accompanied by 53,239 signatures of purported citizens of the state.

Based upon the number of voters eligible to vote in the general election, 51,155 valid signatures were required to effect a nomination by petition.[2]

Subsequent to the filing of the petitions and signatures, the State Administrative Board of Election Laws determined that only 42,049 signatures, valid under the numerous requirements of § 7-1, had been filed by Bradley and that this number was insufficient to qualify him to appear on the ballot for the general election in November 1976.

Bradley ceased soliciting signatures on nominating petitions after March 8, 1976. He filed this complaint on April 30, seeking declaratory and injunctive relief on the two principal grounds that (1) the provision of the Maryland law requiring him to file the requisite number of valid signatures to support his certificate of candidacy by March 8, 1976, was invalid because of its remoteness from the general election to be held November 2, 1976—his claim being that the provision constitutes a violation of the first and fourteenth amendments because it places an unreasonably heavy burden on Bradley to have his name placed on the ballot, and restricts the rights of the remaining plaintiffs to associate freely for the purpose of expressing constitutionally protected political beliefs and to exercise their right to vote, and also that it denies equal protection of the laws because the unnecessarily burdensome requirements of filing nominating petitions at a date far removed from the date of the general election is not applicable to major party candidates—and (2) that the provisions of the Maryland election laws relating to the form and procedure for obtaining "valid" signatures to the nominating petition on their face and as applied deny all of the plaintiffs their first and fourteenth amendment rights by placing an undue burden on Bradley's right to have his name placed on the ballot and

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2 The "validity" of signatures is governed by other provisions of § 7-1. The various requirements are that they be of persons registered to vote, that only signatures of persons registered in the same jurisdiction appear on the same page, that a signer's residence be appended, that the name of a signer be printed immediately below his signature, etc.

thereby restrict the rights of the remaining plaintiffs to associate freely for the purpose of expressing protected political beliefs and exercising their right to vote.

On April 30, the district judge to whom application was made entered an order, with the consent of all parties, permitting Bradley to solicit additional signatures to support his certificate of candidacy and to file the same with defendants until May 18, 1976, but not requiring defendants to take any action thereof until further order of the court. A three-judge court was duly convened, evidence taken and argument heard, and the case submitted to the court on its merits, including plaintiffs' motion for a preliminary and permanent injunction and declaratory relief, defendants' motion to dismiss, and defendants' motion for summary judgment. At the hearing, defendants' motion to dissolve the three-judge court was summarily denied since the court thought that a substantial question of the validity of a statewide provision of the Maryland election law had been raised.

II.

We address ourselves solely to plaintiffs' claim that the provision of § 7-1(e) requiring the filing of signatures by March 8, 1976 is invalid, because we think this question is determinative of the case. Salera v. Tucker, 399 F.S. 1258 (E.D. Pa. 1975), aff'd summarily sub nom. Tucker v. Salera, ____ U.S. ____, 44 U.S.L.W. 3526 (March 22, 1976), is the controlling authority, and we conclude that it requires that plaintiffs be granted relief.

Salera was a decision by a three-judge court which considered two aspects of Pennsylvania's election law with regard to nominating petitions. The Pennsylvania statute, unlike the Maryland statute, imposed a three-week limitation on gathering signatures for nominating petitions and, much like the Maryland statute, required that the signatures supporting a nominating petition be filed not later than 218 days before the general election in a year in which a President

and Vice President would not be elected, and 244 days in a presidential election year[3]

The validity of the statute was attacked on the grounds that (1) the three-week limitation on gathering signatures was an unconstitutional burden on access to the ballot, and (2) the remoteness of the signature gathering period from the general election unconstitutionally impaired the ability of the candidate to qualify as an eligible independent candidate. The three-judge court considered these claims separately. With respect to the first, it held, on the authority of Storer v. Brown, 415 U.S. 724 (1974), that "the three week period is constitutional as applied to plaintiffs." 399 F.S. at 1265. The court held the statute invalid, however, on the basis of plaintiffs' second attack, and its reasoning in this regard warrants closer analysis.

With respect to the claim of remoteness, the court found that the termination of signature gathering 218 days before the general election in a non-presidential election year substantially burdened the ability of independent candidates to gain access to the ballot because it forced them to gather signatures before the issues of the upcoming election had been defined, it forced them to complete the signature gathering process in a political vacuum seven weeks before the major parties choose their candidates, it made the task of generating interest among potential voters more difficult than it would be if the signature gathering period were scheduled at a point closer to the general election, and it required that signature gathering be conducted during a time of the year of prevailing adverse weather conditions—another species of burden. 399 F.S. at 1266. We do not make detailed findings of fact in the instant case, but the evidence before us leads us likewise to conclude that the March 8 termination date of the signature gathering period in the 1976 general election in Maryland substantially burdened the ability of Bradley to gain access to the ballot and

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3 In Maryland, in 1976, the signatures were required to be gathered and filed 239 days before the general election.

substantially burdened the ability of the other plaintiffs to have Bradley as a candidate of their choice appear on the ballot at the general election for all of the reasons assigned by the *Salera* court.

After finding the facts, the *Salera* court considered the argument that three state interests arguably were served by holding the nomination paper circulation period as far in advance of the general election as did Pennsylvania. The first, which was rejected, was to provide sufficient time to resolve challenges to the nomination papers and to prepare the ballots in a deliberate and orderly fashion. Under the evidence, the *Salera* court found that Pennsylvania needed far less time to accomplish these purposes than that which was established under the Pennsylvania statute. 399 F.S. at 1267. The same is true in Maryland. Under Maryland law as applied in 1976, the validity of a nominating petition was required to be determined by April 12, "five weeks or thirty-five days before the day on which the primary election should be held under the primary election law," § 7-1(e), and the certification of candidates whose names will appear on the ballot of the general election is not required to be made to the local Boards of Election Supervisors until August 21, 1976, "[n]ot less than sixty-five days before a general election at which the voters elect the President of the United States . . . ," § 8-4. In the instant case, the validity of Bradley's nominating petition was determined by April 12. Presumably a period equal to the time elapsed between March 8 and April 12 (thirty five days) would be sufficient even if the ascertainment of validity were not undertaken until a later date. The date for certification of candidates is sufficiently removed that validation of the nominating petition could well begin at a later date.

Next, the *Salera* court considered the state's concern that defeated or disaffected primary candidates not use the independent nomination process to thwart the will of the party majority or to wreak vengeance upon the candidate chosen by the party majority. The court concluded that Pennsylvania had accomplished this purpose in other ways. So has Maryland, because Maryland prohibits any person who has

been defeated for the nomination for any office in a primary election from having his name printed on the ballot at the succeeding general election as a candidate for any office, § 8-2, and limits nomination by petition to candidates who are registered as independents, or who are members of or affiliated with a partisan organization which is not a political party or who are not members of a political party whose nominees must be nominated by means of primary elections. § 7-1(a).

A third possible state interest which was considered was the state's interest in the intelligent exercise of the franchise by those voting in the primary, i.e., that a voter in a primary can cast his vote more knowledgeably and effectively if he knows which independent candidates will or will not be on the final ballot. The court rejected this as a validating interest because a primary voter would "not know the identity of a much more significant factor in the general election, i.e., the identity of the other major party candidate." 399 F.S. at 1268. We find this reasoning equally applicable in Maryland.

Finding no validating state interest to justify the remoteness of the cutoff date for garnering supporting signatures for the general election, and the resulting burden on the candidate seeking nomination, the court concluded that the cutoff date was invalid.

The Commonwealth of Pennsylvania, through its appropriate officials, appealed to the Supreme Court, and the decision of the three-judge district court was summarily affirmed. We have been furnished with the Commonwealth's jurisdictional statement and the plaintiffs' motions to affirm. We are advised that the Commonwealth filed no response to the motions to affirm. The plaintiffs took no cross-appeal, and we find it significant that in urging summary affirmance the plaintiffs, on the merits, urged that the district court correctly concluded that the remoteness of the cutoff period from the general election was invalid. Plaintiffs did not argue that the shortness of the period for gathering signatures, either alone or in combination with the remoteness of the cutoff period, supported the result.

Under Hicks v. Miranda, 422 U.S. 332 (1975), we are bound by the summary affirmance in *Salera,* if it can be fairly said that *Salera* decides the issue before us and is not distinguishable on any other ground. From our recitation of what was decided in *Salera* and the proceedings in the Supreme Court, we are confident that *Salera* did decide the issue before us. We reject defendants' argument that the shortness of the signature gathering period under Pennsylvania law contributed to the decision of the district court or the Supreme Court. We think that all that these two courts decided was that the remoteness of the cutoff date of the signature gathering period from the general election constituted an impermissible burden on the Pennsylvania candidates' access to the ballot and the other plaintiffs' right to vote.

We therefore turn to the question of whether *Salera* is distinguishable from the instant case:

Maryland urges that there is present in this case a validating compelling state interest not considered in *Salera,* i.e., the desirability of treating partisan and independent candidates alike by requiring all candidates to file on the same date. This argument does not persuade us. Partisan and independent candidates are not treated alike under Maryland law, nor do we think that Maryland has drawn a close analogy between them. Signature gathering by an independent candidate is not the equivalent of the filing of a declaration of candidacy by a partisan candidate; it is the equivalent of the primary election. Maryland's equal treatment argument would have validity only if the deadline for the filing of petitions was the same date as the primary election, but it is not. Moreover, Maryland's professed desire to treat partisan and independent candidates alike does not compel fixing the cutoff date for filing the requisite number of valid signatures 70 days before the primary election. Quite readily, Maryland could require independent candidates to file a declaration of candidacy at the same time as partisan candidates and then extend the date for the submission of signatures to the date of the primary election. In summary, we think that an "equal treatment"

rationale is faulty and the attempt to distinguish *Salera* on this ground fails.

Maryland next argues that *Salera* should not be given the construction that we place upon it because a consequence would be that our decision in Auerbach v. Mandel, Civil No. 72-141-N, and Barnhart v. Mandel, Civil No. 72-142-N (D. Md. March 3, 1972), aff'd summarily, 409 U.S. 808 (1972), and Maryland People's Party v. Mandel, Civil No. 72-865-K (D. Md. September 5, 1972), aff'd summarily, 410 U.S. 901 (1973), would be overruled, and it cannot lightly be supposed that in affirming summarily in *Salera* the Supreme Court intended to overrule *Auerbach, Barnhart, People's Party sub silentio.* We do not agree that the question presented in the instant case was decided in either *Auerbach, Barnhart,* or *People's Party,* although we recognize that a dictum in *Auerbach* may have indicated a contrary view from that which we take now.

In *Auerbach, Barnhart,* and *People's Party,* we were presented with the question of how a new political party could nominate a candidate. There the claim was made that a new political party could nominate a candidate only by qualifying as a "political party" and that it was an impossibility for a new political party thus to qualify with the result that its candidates were barred from the ballot. *People's Party* was decided upon the authority of *Auerbach; Barnhart* was decided on the ground of laches. In *Auerbach,* we decided that, *on the basis of statutory construction,* § 7-1(a) permitted a candidate for public office, who is a member of a partisan organization which is not a political party, to be nominated by petition. We specified that we decided the case "as a matter of statutory construction," and we added, "it seems to us that there is no constitutional question which the suit of the People's Party raises, and as a consequence, we find no basis for giving relief . . . ." True, in practical recognition that we decided the case on March 3, 1972, and March 6, 1972 was the cutoff date under Maryland law for the filing of a petition of candidacy and the obtention of the signatures necessary to make that petition effective, we added:

> We recognize that this is a heavy burden to be met if somebody is to run. We can only say this, that viewed in the perspective of its reasons, March 6th in itself is not an unreasonable time when you consider the need and the State's legitimate interest in closing the registration books in advance of an election and requiring also that all candidates, whether they be candidates in a primary election for one of the major parties or candidates for a party not having the right to resort to nomination by primary or a candidate of a partisan organization which is not a political party, to be known all at the same time.

With respect to the language just quoted, we reiterate that it was pure dictum.[4] While it seemed to reflect the law at the time it was uttered,[5] we are not now persuaded of its correctness, factually or legally. Factually, further examination of the Maryland statutes and the decision of the district court in *Salera* persuades us that the Maryland filing date requirement does not permit all candidates to know all of their opponents at the same time. A primary candidate of a major political party does not know the nominee of an opposing

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4 An examination of the jurisdictional statement, motion to affirm and response thereto, filed in the Supreme Court in *Auerbach* and *Barnhart*, discloses that the plaintiffs did seek to raise in the Supreme Court the question of the invalidity of the remoteness of the filing date for a petition of candidacy from the general election as a ground for reversal. But since that issue had not been fully litigated before us, we do not believe that the Supreme Court decided it.

5 *See* Socialist Labor Party v. Rhodes, 318 F.S. 1262, 1273 (S.D. Ohio 1970) (three-judge court), aff'd sub nom. Sweetenham v. Gilligan, 409 U.S. 942 (1972) (deadline 9 months before general election upheld); Pratt v. Begley, 352 F.S. 328, 330 (D.Ky. 1970) (three-judge court), aff'd 409 U.S. 943 (1972) (deadline 7 months before general election upheld); Jackson v. Ogilvie, 325 F.S. 864, 867 (N.D. Ill.) (three-judge court) (deadline 60 days before general election upheld), aff'd 403 U.S. 925 (1971); Jenness v. Fortson, 403 U.S. 431, 434-35 (1970) (deadline 150 days before general election upheld); *cf.* Williams v. Rhodes, 393 U.S. 23, 27 (1968) (deadline 270 days before general election, in combination with other restrictive provisions, struck down).

political party—usually the most significant information to be considered by the candidate in concluding whether to run. Nor does a candidate necessarily know his opponents in the primary election in which he seeks to run at the time that he files his certificate of candidacy. Certificates many times are not filed until the last hour of the filing period with the result that knowledge of the identity of his opponent is lacking, and even if known it may be gained too late to make a considered judgment of whether to run. Even if the identity of his opponent is known in time for reflection upon the question of whether to file, under Maryland law that opponent may withdraw before the actual primary election. Again, to the extent that dissemination of knowledge to all is a valid state interest, it could be accomplished in the case of an independent candidate by having him file a certificate of candidacy without requiring him to complete the obtention of the requisite valid signatures seven weeks before the date of the primary election.

Legally, for the reasons we have stated, we think that *Salera* decides the issue before us, and as the latest expression of the Supreme Court, we are bound to follow it.

III.

For the reasons set forth above, we conclude that plaintiffs should be given declaratory and injunctive relief. A declaration will be granted that the time limitation of § 7-1(e) that nominating petitions shall be completed and filed 70 days before the date on which the Maryland 1976 presidential primary election shall be held constitutes an unconstitutional burden on Bradley's right to become an independent candidate and on the rights of the other plaintiffs to exercise their franchise to vote.

We formulate injunctive relief as follows: We have indicated that we think that constitutionally Bradley at least should have had the right to collect the requisite number of valid signatures

until the date of the primary election.[6] The evidence and Maryland's schedule of certification dates establish, however, that administratively it would be feasible for Maryland to afford Bradley a period well beyond that date to complete the signature gathering process.

Bradley was not authorized to gather supporting signatures for the period March 9 to April 30, 1976, when the court ordered that the enforcement of § 7-1(e) be suspended in part. This period comprised 53 days. We therefore conclude that Bradley should be given 53 days after the date of the May 18 primary election to collect and file with defendants additional signatures to support his petition of candidacy, i.e. to the close of business on Saturday, July 10, 1976, or, if that is treated as a holiday, to the close of the next succeeding business day. Thereafter defendants should determine the validity of the same in accordance with the applicable provisions of Maryland law, and if Bradley has obtained and produced a total of 51,155 valid signatures, including those filed on March 8, 1976, defendants shall treat him as properly nominated by petition and certify him as a candidate to appear on the ballot in the general election in accordance with the other applicable provisions of the Maryland statute.

Counsel are requested to agree on a form of final order and present the same within ten days.

United States Circuit Judge

/s/ Roszel C. Thomsen
Senior United States District Judge

United States District Judge

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6 From the evidence before us and the time schedule for certification of primaries set forth in the Maryland statute, Bradley may be entitled to more, but that case is not before us and we do not decide it.

Statement of Jurisdiction
(Sweetenham v. Rhodes)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

HELEN MARCIA SWEETENHAM, *et al.*,

Appellants,

—VS.—

JAMES A. RHODES,
Governor of the State of Ohio, *et al.*,

Appellees.

JURISDICTIONAL STATEMENT
IN SUPPORT OF APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Opinion in the Court Below.

The district court issued an opinion which is not yet reported. It is set forth in the Appendix (p. 10, *et seq.*).

Jurisdiction.

Appellants ask that this appeal be granted to review a part of the judgment entered on July 29, 1970 by the three-judge United States District Court convened below pursuant to 28 United States Code, Section 2281. Appellants claim that their rights were violated contrary to the First and Fourteenth Amendments to the Constitution of the United States.

The jurisdiction of this Court is invoked under 28 United States Code, Sections 1253 and 2101. This Court's jurisdiction is sustained by *Williams v. Rhodes,* 393 U.S. 23 (1968).

The Statutes Involved.

OHIO REVISED CODE.

Section 3513.257 (in pertinent part):

> The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than four per cent of the number of electors who voted for governor, or for presidential electors, at the next preceding regular state election for the office of governor in the district.***
>
> * * * * *
>
> ***Such petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census, not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

Section 3513.258 (in pertinent part):

> The nominating petition of an independent candidate for the office of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney general, judge of the supreme court, president and vice-president of the United States, United States senator and representative at large to congress, shall be signed by not less than four per cent of the number of electors who voted for governor, or for presidential electors, at the next preceding regular state election; provided that no such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum

aggregate number of signatures required by this section.***

* * * * *

Such petition shall be filed with the secretary of state not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

* * * * *

Questions Presented by the Appeal

1. Where a state has previously required that independent candidates file their nominating petitions sixty days before the general election, may it now require them to file nine months before the general election without showing any necessity for the change?

2. Where a state has prescribed that independent candidates for political office must file their nominating petitions approximately nine months before the general election and where such requirement is not shown to be justified by any compelling state need, are the First and Fourteenth Amendments contravened?

Statement of the Case.

This case arrives at this Court as a continuation of a several pronged effort undertaken in January, 1968 to reopen Ohio's election process to minority parties and independent candidates. (*Socialist Labor Party v. Rhodes,* 290 F.Supp. 985 (S.D. Ohio 1968), affirmed *sub nom. Williams v. Rhodes,* 393 U.S. 23 (1968) and *Brockington v. Rhodes,* 396 U.S. 41 (1969).) The need for this effort has been aptly described by Judge Kinneary of the Southern District of Ohio:

> During the fifteen year period prior to 1947, participation in the electoral process by independently nominated

candidates was neither substantial nor disruptive. Nevertheless in that year the Ohio General Assembly began a series of changes in the election laws which ultimately resulted in the complete elimination of independent and third party voters and candidates from Ohio's political arena. *Socialist Labor Party v. Rhodes,* 290 F. Supp. 985 at 994.

The situation in 1968 could be illustrated metaphorically by likening Ohio's election laws to a jungle which was so overgrown that it choked out and prevented any new growth. Part of this noxious growth was removed by *Socialist Labor Party v. Rhodes, supra,* where the right to write-in votes was returned to Ohio electors. When that case was affirmed in part by this Court, *sub nom., Williams v. Rhodes, supra,* the right to run for president as an independent candidate was also restored and an incredibly burdensome 15% signature requirement for new political parties was overturned.

Shortly thereafter, this Court noted probable jurisdiction in *Brockington v. Rhodes, supra,* which attacked the signature gathering requirement imposed on independent candidates in Ohio. Before that case could be heard, Ohio's legislature grudgingly acknowledged the imperative placed upon it by the decisions in the *Socialist Labor Party* and *Williams* cases and thereafter reduced signature gathering for political parties to 7% and for independent candidates to 4%. (A few months later, *Brockington, supra,* was held moot by this Court primarily for reasons of Ohio procedure.)

These events cleared only a part of the forest. The new percentages were a change in name only so far as independents and third parties were concerned. In terms of their ability to comply—there was no change. In addition, all independent candidates had to file their petitions in February—nine months before the election. And independent candidates for state office still had to gather a minimum number of signatures in many counties despite the fact that most of Ohio's population is concentrated in only a few of its 88 counties. New political

parties still faced incredibly complex requirements as to internal organization (see footnote 1 to *Williams v. Rhodes,* 393 U.S. at 25) and an offensive loyalty oath requirement.

This case and a companion case for the Socialist Labor Party were filed in an attempt to complete the task of democratizing Ohio's electoral system. Significant success was attained below. In the *Socialist Labor Party* case which involved a constitutional challenge to some nine statutes, only the loyalty oath survived. In the subject case, of three statutes complained of, only the requirement that independent candidates file their nominating petitions nine months before the general election was allowed to stand.

This appeal, therefore, deals with the requirement of when the nominating petitions of independent candidates must be filed. It arises on these uncontested facts:

Appellant Sweetenham is an independent candidate for Governor of Ohio and appellant Stapleton is an independent candidate for Congressman from Ohio's Twenty-second District. They intend to be candidates in future elections as well. They asked below for declaratory and injunctive relief. The district court declined to grant affirmative relief, holding that the early filing requirement was valid.

Under the 4% statute, appellant Sweetenham faced the task of securing the staggering total of 158,388 valid signatures. Appellant Stapleton needed 5,572 valid signatures. By August 4, 1970 Sweetenham had accumulated 1,614 signatures and had tendered them to the Secretary of State, who refused to accept them. By August 3, 1970 Stapleton had 2,455 signatures and his tender on that date to the Cuyahoga County Board of Elections was likewise refused. These tenders were made more than ninety days before the General Election and under former statutes were timely.

Substantiality of Questions Involved.

Cases dealing with suffrage carry special freight. The right to vote is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). The assertion in our Declaration of Independence that governments derive "their just powers from the consent of the governed" leads ineluctably to the principle that:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *Reynolds v. Sims,* 377 U.S. 533, 555 (1964).

It seems, therefore, that where government is representative in nature, where the representatives are chosen only at fixed periods, and where the representatives are empowered to act on crucial matters, elections must be conducted so that citizens have the freest possible choice consonant with the logistics of the election process. Courts should be diligent to guard this opportunity because there are many things that elected majorities can do to prevent election competition and to preserve their place in office.

The requirement attacked here is an example. Ohio has required that independent petitions be filed ninety days before the party primary elections in May. It is not coincidence that this date also is the deadline for filing of papers for candidates in the party primaries. Thus, these statutes enforce party discipline through *state law.* The aim is to prevent someone from running in the party primary, losing, and later filing as an independent.

Because of the early date set for the primary in Ohio, the system runs roughshod over the rights of independent candidates. Astoundingly, the court below found the statutory preference accorded political parties over independents to be constitutionally legitimate, stating:

> One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process.

The implicit assumption in this is that only opportunistic and disgruntled party members use the independent candidate process. This ignores the reality that there are many, perhaps millions, of people in the United States who are true independents with no allegiance to any political party.

> Although a large majority of our people hold allegiance to the two major political parties in this nation and believe that free government is most efficiently perpetuated through a two-party system, nevertheless there are millions of independent voters who should always be given an equal right of suffrage with party members. *Beck v. Hummel,* 150 Ohio St. 127, 80 N.E.2d 899, 906 (1948).

What the District Court has done is elevate the interest of political parties over the rights of independents and the *interest of free elections.* There is no warrant for this in the Constitution.

(We mentioned above that it was the joining of the filing requirement with the early Ohio primary that caused the early filing. As this is being written in September, 1970, several states are conducting party primaries for the elections in November. Ohio has thus chosen a May primary for reasons other than necessity. Perhaps the major parties should be allowed the early primary if they desire it, but surely they should not be permitted to force it upon independents.)

Of overriding importance is the fact that for many years Ohio conducted elections efficiently while having a filing date of no later than 60 days before the general election. Section 4785-92, Ohio General Code. The change in 1952—after the Henry Wallace candidacy—to the present rule has never been justified by Ohio on any basis. It cannot be. It was in fact part and parcel of that effort—so well described by Judge Kinneary

in *Socialist Labor Party v. Rhodes, supra*—to remove all independents from the ballot.

The statute requiring independents to file as early as February received judicial scrutiny in the first *Socialist Labor Party* case. There the district court noted that the George Wallace candidacy was thwarted in part by the early filing rule. It said:

> Under Section 3513.25.8, Ohio Revised Code, a petition for nomination to state office as an independent candidate must be filed ninety days before the primary election rather than ninety days before the general election. *This is an unreasonable requirement.* (Emphasis added.) 290 F.Supp. 983 at 989.

When that case was appealed and decided *sub nom., Williams v. Rhodes,* 393 U.S. 23 (1968), this Court left no doubt of its view of the early filing requirement. It said:

> The State also argues that its requirement of a party structure and an organized primary insures that those who disagree with the major parties and their policies "will be given a choice of leadership as well as issues" since any leader who attempts to capitalize on the disaffection of such a group is forced to submit to a primary in which other, possibly more attractive leaders can raise the same issues and compete for the allegiance of the disaffected group. But while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected "group" will rarely if ever be a cohesive or identifiable group until a few months before the election. *Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot* and the Ohio system thus denies the "disaffected" not only a

choice of leadership but a choice on the issues as well. 393 U.S. at 32. (Emphasis added.)

Conclusion.

Ohio's early primary and filing system obviously favors the political parties whose machinery remains intact from election to election. Independent campaigns have no such cohesiveness. Usually their campaigns are marked by volunteer and amateur efforts. Frequently they surface relatively late in the election year on the basis of issues which crystallize after the May party primaries.

The life blood of our democratic system is the election process. The government asks the loyalty and cooperation of the citizen on the premise that each citizen through his representative has a say in the laws under which we live. This Court, therefore, has condemned the fencing out of any group from the electoral process.

If states are able to erect and maintain barriers to the ballot of the sort challenged here, how are the arguments of the "disaffected" to be answered?

Respectfully submitted,

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JERRY GORDON,
Of Counsel.

Text of Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

ARTICLE II

Section 1.

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE § 3513.04

. . . .

. . . .

No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in.

OHIO REVISED CODE § 3513.05

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election, except persons desiring to become joint candidates for the offices of governor and lieutenant governor, shall, not later than four p.m. of the seventy-fifth day before the day of the primary election, file a declaration of candidacy and petition and pay the fee required by section 3513.10 of the Revised Code. The declaration of candidacy and all separate petition papers shall be filed at the same time as one instrument. When the offices are to be voted for at a primary election, persons desiring to become joint candidates for the offices of governor and lieutenant governor shall, not later than four p.m. of the seventy-fifth day before the day of the primary election, comply with section 3513.04 of the Revised Code. The prospective joint candidates' declaration of candidacy and all separate petition papers of candidacies shall be filed at the same time, as one instrument.

If the declaration of candidacy declares a candidacy which is to be submitted to electors throughout the entire state, the petition, including a petition for joint candidates for the offices of governor and lieutenant governor, shall be signed by at least one thousand qualified electors who are members of the same political party as the candidate or joint candidates and the declaration of candidacy and petition shall be filed with the secretary of state; provided that the secretary of state shall not accept or file any such petition appearing on its face to contain signatures of more than three thousand electors.

If the declaration of candidacy is of one that is to be submitted only to electors within a district, political subdivision, or portion thereof, the petition shall be signed by qualified electors who are members of the same political party as the political party of which the candidate is a member in numbers as follows:

(A) In any district, political subdivision, or portion of a political subdivision in which the vote for the office of governor at the next preceding election for that office was less than five thousand, such petition shall contain a minimum of twenty-five qualified signatures or a number of qualified signatures equal to at least five percent of that vote, if this number is less than twenty-five.

(B) In any district, political subdivision, or portion of a political subdivision such petition shall contain a minimum of fifty qualified signatures if the vote for the office of governor at the next preceding election for that office in such district, subdivision, or part thereof was five thousand but less than twenty thousand.

(C) In any district, political subdivision, or portion of a political subdivision such petition shall contain a minimum of one hundred qualified signatures if the vote for the office of governor at the next preceding election for that office in such district, subdivision, or part thereof was twenty thousand but less than fifty thousand.

(D) In any district, political subdivision, or portion of a political subdivision such petition shall contain a minimum of one hundred fifty qualified signatures if the vote for the office of governor at the next preceding election for that office in such district, subdivision, or part thereof was fifty thousand or over.

No such petition, except the petition for a candidacy that is to be submitted to electors throughout the entire state, is valid if it appears to contain on its face signatures of more than five times the minimum number of qualified signatures, nor shall

the board of elections file any such petition appearing to contain on its face more than the maximum number of signatures allowed.

If the declaration of candidacy declares a candidacy for party nomination or for election as a candidate of an intermediate or minor party, the minimum number of signatures on such petition is one-half the minimum number provided in this section, except that in any district, political subdivision, or portion of a subdivision described in division (A) of this section or when the candidacy is one for election as a member of the state central committee or the county central committee of a political party the minimum number shall be the same for an intermediate or minor party as for a major party.

If the declaration of candidacy is one for election as a member of the state central committee or the county central committee of a political party, the petition shall be signed by five, but not more than twenty-five, qualified electors of the district, county, ward, township, or precinct within which electors may vote for such candidate. The electors signing such petition shall be members of the same political party as the political party of which the candidate is a member.

For purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if he voted in that party's primary election within the preceding two calendar years, or if he did not vote in any other party's primary election within the preceding two calendar years.

If the declaration of candidacy is of one that is to be submitted only to electors within a county, or within a district or subdivision or part thereof smaller than a county, the petition shall be filed with the board of elections of the county. If the declaration of candidacy is of one that is to be submitted only to electors of a district or subdivision or part thereof that is situated in more than one county, the petition shall be filed with the board of elections of the county within

which the major portion of the population thereof, as ascertained by the next preceding federal census, is located.

A petition shall consist of separate petition papers, each of which shall contain signatures of electors of only one county. Petitions or separate petition papers containing signatures of electors of more than one county shall not thereby be declared invalid. In case petitions or separate petition papers containing signatures of electors of more than one county are filed, the board shall determine the county from which the majority of signatures came, and only signatures from such county shall be counted. Signatures from any other county shall be invalid.

Each separate petition paper shall be circulated by one person only, who shall be the candidate or a joint candidate or a member of the same political party as the candidate or joint candidates, and who shall declare under penalty of election falsification that each of the signatures affixed thereto is the signature of the person whose signature it purports to be, and that each of such signers affixed his signature in the presence of the circulator.

The secretary of state shall promptly transmit to each board such separate petition papers of each petition accompanying a declaration of candidacy filed with him as purport to contain signatures of electors of the county of such board. The board of the most populous county of a district shall promptly transmit to each board within such district such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the county of each such board. The board of a county within which the major portion of the population of a subdivision, situated in more than one county, is located, shall promptly transmit to the board of each other county within which a portion of such subdivision is located such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the portion of such subdivision in the county of each such board.

All petition papers so transmitted to a board and all petitions accompanying declarations of candidacy filed with such board shall, under proper regulations, be open to public inspection until four p.m. of the seventieth day before the day of the next primary election. Each board shall, not later than the sixty-ninth day before the day of such primary election, examine and determine the validity or invalidity of the signatures on the petition papers so transmitted to or filed with it and shall return to the secretary of state all petition papers transmitted to it by the secretary of state, together with its certification of its determination as to the validity or invalidity of signatures thereon, and shall return to each other board all petition papers transmitted to it by such board, together with its certification of its determination as to the validity or invalidity of the signatures thereon. All other matters affecting the validity or invalidity of such petition papers shall be determined by the secretary of state or the board with whom such petition papers were filed.

Protests against the candidacy of any person filing a declaration of candidacy for party nomination or for election to an office or position, as provided in this section, may be filed by any qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy he objects to, or by the controlling committee of such party. Such protest must be in writing, and must be filed not later than four p.m. of the sixty-fifth day before the day of the primary election. Such protest shall be filed with the election officials with whom the declaration of candidacy and petition was filed. Upon the filing of such protest the election officials with whom it is filed shall promptly fix the time for hearing it, and shall forthwith mail notice of the filing of such protest and the time fixed for hearing to the person whose candidacy is so protested. They shall also forthwith mail notice of the time fixed for such hearing to the person who filed the protest. At the time fixed such election officials shall hear the protest and determine the validity or invalidity of the

declaration of candidacy and petition. If they find that such candidate is not an elector of the state, district, county, or political subdivision in which he seeks a party nomination or election to an office or position, or has not fully complied with this chapter, his declaration of candidacy and petition shall be determined to be invalid and shall be rejected, otherwise it shall be determined to be valid. Such determination shall be final.

A protest against the candidacy of any persons filing a declaration of candidacy for joint party nomination to the offices of governor and lieutenant governor shall be filed, heard, and determined in the same manner as a protest against the candidacy of any person filing a declaration of candidacy by himself.

The secretary of state shall, on the sixtieth day before the day of a primary election, certify to each board in the state the forms of the official ballots to be used at such primary election, together with the names of the candidates to be printed thereon whose nomination or election is to be determined by electors throughout the entire state and who filed valid declarations of candidacy and petitions.

The board of the most populous county in a district comprised of more than one county but less than all of the counties of the state shall on the sixtieth day before the day of a primary election, certify to the board of each county in the district the names of the candidates to be printed on the official ballots to be used at such primary election, whose nomination or election is to be determined only by electors within such district and who filed valid declarations of candidacy and petitions.

The board of a county within which the major portion of the population of a subdivision smaller than the county and situated in more than one county is located shall, on the sixtieth day before the day of a primary election certify to the board of each county in which a portion of such subdivision is located the names of the candidates to be printed on the

official ballots to be used at such primary election, whose nomination or election is to be determined only by electors within such subdivision and who filed valid declarations of candidacy and petitions.

OHIO REVISED CODE § 3513.12

At the primary election which shall be held on the first Tuesday after the first Monday in June in the year 1976, and similarly in every fourth year thereafter, delegates and alternates to the national conventions of the different major political parties shall be chosen by direct vote of the electors as provided in this chapter. Candidates for delegate and alternate shall be qualified and the election shall be conducted in the manner prescribed in this chapter for the nomination of candidates for state and district offices, except as provided in section 3513.151 [3513.15.1] of the Revised Code and except that whenever any group of candidates for delegate at large or alternate at large, or any group of candidates for delegates or alternates from districts, file with the secretary of state statements as provided by this section, designating the same persons as their first and second choices for president of the United States, such a group of candidates may submit a group petition containing a declaration of candidacy for each of such candidates. The group petition need be signed only by the number of electors required for the petition of a single candidate. No group petition shall be submitted except by a group of candidates equal in number to the whole number of delegates at large or alternates at large to be elected or equal in number to the whole number of delegates or alternates from a district to be elected.

Each person seeking to be elected as delegate or alternate to the national convention of his political party shall file with his declaration of candidacy and certificate a statement in writing signed by him in which he shall state his first and second choices for nomination as the candidate of his party for the presidency of the United States. The secretary of state shall

not permit any declaration of candidacy and certificate of a candidate for election as such delegate or alternate to be filed unless accompanied by such statement in writing. The name of a candidate for presidency shall not be so used without his written consent.

A person who is a first choice for president of candidates seeking election as delegates and alternates shall file with the secretary of state, prior to the day of the election, a list indicating the order in which certificates of election are to be issued to delegate or alternate candidates to whose candidacy he has consented, if fewer than all of such candidates are entitled under party rules to be certified as elected. Each candidate for election as such delegate or alternate may also file along with his declaration of candidacy and certificate a statement in writing signed by him in the following form:

Statement of candidate for election
(delegate)
as to the (here insert name of
(alternate)
political party) national convention.

I hereby declare to the voters of my political party in the state of Ohio that, if elected as
(delegate)
to their national party convention,
(alternate)
I shall, to the best of my judgment and ability, support that candidate for president of the United States who shall have been selected at this primary by the voters of my party in the manner provided in this chapter, as their candidate for such office.

.....
delegate

For signature of candidate for

alternate

OHIO REVISED CODE [§ 3513.25.7] § 3513.257

Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the first Tuesday after the first Monday in June immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 [3513.26.1] of the Revised Code. Persons desiring to become independent joint candidates for the offices of governor and lieutenant governor shall file, not later than four p.m. of the seventy-fifth day before the first Tuesday after the first Monday in June, one statement of candidacy and one nominating petition for the two of them. The prospective independent joint candidates, statement of candidacy shall be filed with the nominating petition as one instrument. The nominating petition shall contain signatures of qualified electors of the district, political subdivision, or portion of a political subdivision in which the candidacy is to be voted for in an amount to be determined as follows:

(A) If the candidacy is to be voted for by electors throughout the entire state, the nominating petition, including the nominating petition of independent joint candidates for the offices of governor and lieutenant governor, shall be signed by no less than five thousand qualified electors, provided that no petition shall be accepted for filing if it purports to contain more than fifteen thousand signatures.

(B) If the candidacy is to be voted for by electors in any district, political subdivision, or part thereof in which less than five thousand electors voted for the office of governor at the next preceding election for that office, the nominating petition shall contain signatures of not less than twenty-five qualified electors of the district, political subdivision, or part thereof, or a number of qualified signatures equal to at least five per cent of that vote, if this number is less than twenty-five.

(C) If the candidacy is to be voted for by electors in any district, political subdivision, or part thereof in which five thousand or more electors voted for the office of governor at the next preceding election for that office, the nominating petition shall contain a number of signatures equal to at least one percent of those electors.

All nominating petitions of candidates for offices to be voted by electors throughout the entire state shall be filed in the office of the secretary of state. No nominating petition for the offices of president and vice-president of the United States shall be accepted for filing unless there is submitted to the secretary of state, at the time of filing the petition, a slate of presidential electors sufficient in number to satisfy the requirement of the United States Constitution. The secretary of state shall not accept for filing the statement of candidacy of a person who desires to be an independent candidate for the office of governor unless it also shows the joint candidacy of a person who desires to be an independent candidate for the office of lieutenant governor, shall not accept for filing the statement of candidacy of a person who desires to be an independent candidate for the office of lieutenant governor unless it also shows the joint candidacy of a person who desires to be an independent candidate for the office of governor, and shall not accept for filing the statement of candidacy of a person who desires to be an independent candidate to the office of governor or lieutenant governor who has already been shown as an independent candidate for governor or lieutenant governor on a statement of candidacy previously filed and accepted during the filing period preceding the same primary election.

Nominating petitions of candidates for offices to be voted on by electors within a district or political subdivision comprised of more than one county but less than all counties of the state shall be filed with the boards of elections of that county or part of a county within the district or political subdivision which had a population greater than that of any other county or part of a county within the district or political subdivision according to the last federal decennial census.

Nominating petitions for offices to be voted by electors within a county or district smaller than a county shall be filed with the board of elections for such county.

No petition other than the petition of a candidate whose candidacy is to be considered by electors throughout the entire state shall be accepted for filing if it appears on its face to contain more than five times the minimum number of signatures.

OHIO REVISED CODE § 3517.01

(A) A political party within the meaning of Title XXXV [35] of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for such office or which filed with the secretary of state, subsequent to any election in which it received less than five per cent of such vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing. No such group of electors shall assume a name or designation which is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president it shall cease to be a political party.

Supreme Court, U. S.
FILED
SEP 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. CELEBREZZE, JR., in his official Capacity as Secretary of State of the State of Ohio,
Petitioner,

v.

JOHN B. ANDERSON, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. 80-182

ANTHONY J. CELEBREZZE, JR., in his official Capacity as Secretary of State of the State of Ohio,
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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF CASE

Petitioner seeks to invoke the extraordinary procedure of certiorari prior to judgment in the Court of Appeals. While important constitutional rights are surely involved in this litigation, the issues are hardly novel or of the "imperative" nature that has, in the past, justified this extraordinary writ.

On April 24, 1980, respondent John Anderson announced his independent candidacy for the Presidency and began efforts to secure placement of his name as an independent candidate for that office on the ballots of every state. Between May 10 and May 15 his supporters in Ohio gathered the required signatures and on May 16, tendered them to respondent. The tender was refused on the sole ground that the March 20 filing deadline had passed.[1] On May 19 respondents brought this action and, following briefing of cross-motions for summary judgment, and oral argument on June 26, 1980, the District

[1] By the parties' Joint Stipulation of Fact, Petr. App. 66-72, it is clear that Anderson is a serious and viable candidate with substantial community support.

Court in a 26-page opinion granted summary judgment for plaintiffs.

The District Court, correctly applying settled principles of constitutional analysis set forth in this Court's ballot access decisions ranging from *Williams* v. *Rhodes*, 393 U.S. 23 (1968) to *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979), concluded that Ohio's March 20 filing deadline for independent Presidential candidates was unconstitutional. Under Ohio law, while independent candidates for the office of presidency must submit all their nominating papers by March 20, partisan presidential candidates need not take any action in Ohio prior to receiving their party's nominations in late July or August. The District Court found that the March 20 filing deadline—earlier than in all but two other jurisdictions in the fifty states and District of Columbia—substantially burdened respondents' voting rights and First Amendment rights of association and expression, and invidiously discriminated against independent as opposed to partisan candidates for the Presidency.

In view of this burden and discrimination involving fundamental rights, the District Court held that the filing deadline could be justified "only if it is necessary to achieve a compelling state interest," and carefully considered the dual justifications offered by petitioner in its support: an interest in preserving political stability by assuring the "true" independence of independent candidates, and an interest in treating partisan candidates "equally" with independent candidates. With regard to the first, the District Court concluded that there was in fact "no interest served by the filing deadline other than its simple function as an arbitrary point in time when independent candidates must officially throw their hats into the political ring." Petr. App. 56. And it found the State's argument based on "equality" of treatment wholly unavailing "where the party candidates are not chosen until July or August and where all candidates must respond to national, not just state issues,"

with the "political parties hav[ing] an opportunity to respond to . . . shifting and emerging national issues after the State's [independent] filing deadline." *Id.* at 61. The District Court accordingly concluded that "neither the abridgement [of rights] nor the discrimination are justified by compelling state interests." *Id.* at 63.

Following judgment in the Court below petitioner filed his Notice of Appeal. Thereafter, on July 31, 1980 respondents moved for expedited consideration in the Court of Appeals, proposing that the parties adopt their briefs filed in the District Court with supplemental memoranda to be filed within seven days. Petitioner opposed this request for expedition and it was denied. On August 7 petitioner simultaneously filed in this Court a petition for writ of certiorari to the Sixth Circuit, prior to judgment in that Court, and a Motion to Expedite consideration of the petition. Pursuant to Order of the Chief Justice, respondents filed their response to the Motion to Expedite on August 11, 1980 indicating their willingness to proceed by an expeditious schedule for consideration of the petition for certiorari. By Order dated August 15, 1980, this Court denied petitioner's motion to expedite.

Ohio's March 20 filing deadline is one of five unusually early deadlines, falling in March or early April, that have been challenged by respondent Anderson in suits filed in federal court.[2] In each case, plaintiff Anderson and his supporters claimed that the unreasonably early filing deadline at issue was unconstitutional in two respects: first, that the remoteness of the deadline from the general election (seven to eight months) burdened fundamental rights in violation of the First Amendment, and second, that the deadline invidiously discriminated against independent candidates vis-a-vis partisan candidates in violation of the Equal Protection Clause.

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[2] The vast majority of states (thirty-three), including virtually every large state, have filing deadlines for independent Presidential candidates in August or September; almost all the other states have filing deadlines that fall in June or July.

Plaintiffs have prevailed in each case, and state officials have been ordered to place Anderson's name on the ballot. *See Anderson* v. *Hooper*, Civil No. 80-432-M Civil (D.N.M., July 8, 1980), (permanent injunction entered, August 12, 1980); *Anderson* v. *Morris*, Civil No. Y-80-1632 (D. Md., Aug. 6, 1980); *Anderson* v. *Quinn*, Civil No. 80-0176 P (D. Me., Aug. 11, 1980); *Anderson* v. *Mills*, Civil No. 80-18 (E.D. Ky., Aug. 14, 1980), all reprinted as appendices to this Brief in Opposition. In three of these other four actions—Maine, Maryland and New Mexico—the court held the early filing deadline at issue unconstitutional on both of the grounds asserted by plaintiffs. The Kentucky case was decided in favor of plaintiffs on state law grounds, but referred to the reasoning of the District Courts on the constitutional issues in the other cases cited as "persuasive." [3]

As of September 1, Congressman Anderson had been officially certified on the ballot in 27 states comprising 302 electoral votes; had complied with all requirements in 11 additional states and the District of Columbia and was awaiting the date of the ministerial act of certification in those jurisdictions; was conducting petition drives in 10 additional states; and was awaiting the statutory starting date to begin petition drives in the remaining 2 states.

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[3] In New Mexico defendants have not appealed. Defendants in Maryland, Kentucky and Maine have filed appeals to the respective courts of appeals. No other state challenges are currently outstanding except in North Carolina, where plaintiffs Anderson and his supporters prevailed on state law grounds in an action against the State Election Board to have his name placed on the ballot in that state, *Anderson* v. *Babb*, Civil No. 08-561-5 (E.D.N.C., Aug. 21, 1980), and where intervenor Democratic National Committee but not the State Board has filed an appeal.

SUMMARY OF ARGUMENT

I. No special circumstances are present that justify granting a writ of certiorari prior to judgment in the Court of Appeals. In reaching its result the District Court applied well-settled principles set forth as recently as this Court's decision in *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979). The only question decided below was the validity of Ohio's filing deadline in view of the particular interests advanced by the State in support thereof, and petitioner himself thwarted the probability that the case could already have been heard and decided by the Sixth Circuit.

II. The District Court correctly concluded that Ohio's early filing deadline for independent Presidential candidates burdens plaintiffs' fundamental rights, and discriminates against independents and in favor of partisan candidates in the exercise of those rights. It thus properly examined the statute to determine whether it was justified by any compelling state interests. Petitioner's contention that, before requiring the state to offer *any* justification for the early filing deadline, the Court should have required a showing that "reasonably diligent candidates" could not comply with its requirements, flows from a plain misreading of this Court's decisions in *Storer* v. *Brown*, 415 U.S. 724 (1974), and *Mandel* v. *Bradley*, 432 U.S. 173 (1977).

III. Ohio plainly discriminates against independent Presidential candidates by requiring them to file their nominating petitions and otherwise fully qualify for placement on the ballot by March 20, while at the same time imposing *no* requirement that partisan Presidential candidates take *any* action in Ohio until sometime in late August. Petitioner's argument, raised for the first time in his Petition for Certiorari, that the proper comparison is between independent candidates and political parties, does not eliminate the discriminatory impact of the filing deadline since supporters of an independent candidate

like respondent Anderson must effectuate their choice by mid-March while members of a political party are free until mid-summer to designate their parties' choice.

IV. Ohio's filing deadline for independent candidates was not intended as a mechanism to promote the integrity of the partisan primary process or to assure the "true" independence of nonpartisan candidates. It was designed simply to exclude nonmajor party candidates as part of a restrictive scheme condemned by this Court in *Williams* v. *Rhodes*, 393 U.S. 23 (1968), and in practice and effect does not promote goals of political stability. Even if the filing deadline could be regarded as a political stability measure, moreover, it would not meet the tests set forth in *Storer* v. *Brown*, *supra*: the filing deadline is discriminatory on its face and in its impact, there being no comparable requirement for partisan Presidential candidates, and the burden it imposes on fundamental rights far outweighs any minimal contribution it may make to the integrity of the partisan Presidential selection process.

V. This Court's summary affirmance in *Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972), in no way controls disposition of this case. The three-judge court held that plaintiffs, who had taken no steps to comply with Ohio's filing requirements until after the state primary (four months after the filing deadline) were not entitled to relief because of their failure to do anything "at or before the time" when partisan candidates were chosen. The validity of the deadline itself was thus not ruled on. In addition, plaintiffs in *Sweetenham* could not and did not raise the Equal Protection challenge advanced by respondents: that requiring an independent Presidential candidate to file by March 20 while imposing no filing deadline on partisan Presidential candidates until the end of the summer is an invidious and unjustified discrimination.

ARGUMENT

I. This Case Is Not of Such Imperative Public Importance As to Justify Deviation from Normal Appellate Practice By Granting Certiorari Prior to Judgment in the Court of Appeals

Pursuant to Sup. Ct. R. 18, a petition for a writ of certiorari prior to judgment in the Court of Appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." While respondents agree that important constitutional rights affecting their access to the political process are involved here, they do not agree that the issues are in any way novel or unsettled, or that the case presents the kind of "imperative" public concerns or need for urgency that have characterized this Court's prior exercise of this extraordinary power.

The public importance and constitutional novelty of the issues presented in the rare cases in which certiorari prior to judgment has been granted in the last thirty years was beyond question. As the Court is well aware, at the time of *United States* v. *Nixon*, 418 U.S. 683 (1974), this country was in the midst of a major constitutional crisis involving confrontations between the President, the Congress, and the Courts. The President's claim of an absolute privilege to withhold Presidential communications sought by judicial subpoena in a criminal trial was "contrary to the basic concept of separation of powers and . . . checks and balances . . . ." 418 U.S. at 704. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 579 (1952), issues of similar constitutional novelty and public importance were posed by the President's seizure of the nation's steel mills. The Court rejected an effort to sustain the seizure as an exercise of constitutional war powers, concluding that the President's action had in

effect usurped Congress' lawmaking function.[4] Finally, *Wilson* v. *Girard*, 354 U.S. 524 (1957), involved a challenge to the operation of a jurisdictional agreement between two sovereign nations, the United States and Japan, in connection with the jurisdiction of the Japanese courts to try an American serviceman.

These cases all involved a major issue of constitutional authority as between two or more branches of the Federal Government or an issue affecting the foreign policy of the United States and its relation with another sovereign. They are thus well within the scope of the "main purpose of granting the Supreme Court the rarely exercised power to take a case from a Court of Appeals before judgment . . . to make it possible for extremely important cases, in which the public interest required an immediate authoritative decision, to reach the Supreme Court without delay." Stern & Gressman, Supreme Court Practice § 2.3 (5th ed. 1978). Virtually all other instances in which this power has been exercised have similarly involved "cases of great constitutional significance and of extraordinary national importance for other reasons." *Id.* at § 4.21.[5]

While important constitutional rights are at stake here, the District Court did no more than apply well-established constitutional principles affirmed as recently as this Court's decision in *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979). The principles of analysis applied by the court below are those elucidated in that case, and numerous other decisions of this Court. *See, e.g., Williams* v. *Rhodes*, 393 U.S. 23

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[4] In that case, two justices noted their dissent from petitioners' failure to have sought review first in the Court of Appeals. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (order granting certiorari) (Burton, J., with Frankfurter, J., mem. explaining vote to deny).

[5] One other category of case in which this power has been exercised is represented by the *New Haven Inclusion Cases*, 399 U.S. 392 (1970) (certiorari before judgment granted to review companion case to one already before the Court).

(1968); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Mandel* v. *Bradley*, 432 U.S. 173 (1977); *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party* v. *White*, 415 U.S. 767 (1974). And the District Court's analysis and decision are in harmony with the decisions of three other District Courts that have reached similar results in challenges to filing deadlines brought by respondent Anderson.

While Anderson's presence on the Ohio ballot is surely important,[6] the legal question decided below—whether Ohio's filing deadline was, in the context of Ohio election law, justified by the particular interests advanced by the State of Ohio in support thereof—entirely lacks the nationwide effect or impact of the presidential assertion of absolute privilege or an order of seizure of steel mills across the country. Reversal or modification of the Ohio decision will not necessarily have any impact on the other filing deadline cases decided on constitutional grounds since the issue in each case was whether the particular filing deadline was, in the context of that particular state's election laws, justified by the particular interests asserted by each state.

Finally, respondents respectfully submit that granting certiorari before judgment in this case would be a signal of encouragement for litigants who desire to bypass the ordinary appellate procedure and obtain review directly

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[6] Virtually any non-major party candidate, in any state, in a close election could arguably tip the balance between two major party contenders by gathering as little as one-half of one percent of the popular vote. Petitioner's argument that, because of Ohio's electoral votes and respondent Anderson's popularity immediate review by this Court is necessary to avoid throwing in doubt the results of the presidential election, would favor granting certiorari before judgment in a literal host of cases that have in recent presidential election years arisen concerning ballot access and ballot placement issues. In addition to cases discussed in the text, see, e.g., *McCarthy* v. *Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976); *McCarthy* v. *Exon*, 424 F. Supp. 1143 (D. Neb. 1976); *McCarthy* v. *Tribbitt*, 421 F. Supp. 1193 (D. Del. 1976); *LaRouche* v. *Guzzi*, 417 F. Supp. 444 (D. Mass. 1976).

in this Court. There was simply no reason, in terms of timing, for petitioners to have sought to evade review in the Sixth Circuit. Indeed, in both the Maine and Maryland filing deadline cases, decided by the District Courts substantially later than the instant case, and in a North Carolina ballot access case decided on state law grounds only two weeks ago, expedited schedules for hearing in the appropriate Courts of Appeals were established and all three cases will be fully submitted, argued and ready for decision by September 9, 1980. It appears that the State seeks to evade review in the Sixth Circuit, not because of any practical urgency of timing but because it justifiably fears that the Sixth Circuit would agree with Judge Duncan's careful application of well settled principles of constitutional law and that this Court would thereafter deny plenary review of a District Court decision squarely affirmed by a Court of Appeals.[7]

For these reasons, and for reasons that follow, respondents do not believe that the criteria for granting certiorari pursuant to Sup. Ct. R. 17 have been met and *a fortiori* submit that the special criteria for granting certiorari prior to judgment pursuant to Rule 18 have not been met.

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[7] Petitioner has recently indicated in a Motion for Enlargement of Time filed in the Court of Appeals that, in the event this Court denies his current petition for certiorari prior to judgment, he wishes to have 30 days following such action in which to file a brief and appendix in the Sixth Circuit. Since appellees would thereafter have a similar time period in which to file their brief, such action by the Secretary of State would, in effect, waive his opportunity for pre-election appellate review by the Court of Appeals—suggesting again that petitioner simply does not believe he can prevail on appeal in that Court.

II. This Court's Decisions in *Storer* v. *Brown* and *Mandel* v. *Bradley* Do Not Hold that Restrictive Ballot Access Laws Must Serve Compelling State Interests Only If a Reasonably Diligent Candidate Could Not Meet The Requirements: Thus, There Is No Conflict Between The District Court's Decision And This Court's Decisions

Part II of the Petition asserts that the District Court engaged in a "flat assertion" that Ohio's filing deadline substantially abridged fundamental rights and that in so doing the Court was adopting an improper "per se" test of constitutionality inconsistent with this Court's decisions in *Storer* v. *Brown* and *Mandel* v. *Bradley*. These assertions are simply incorrect, and mischaracterize both the District Court's analysis and its result.

The District Court began by noting this Court's declaration that "[r]estrictions on access to the ballot burden two distinct and fundamental rights, 'the rights of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' [*Williams* v. *Rhodes*, 393 U.S. 23 (1968).] *Illinois State Board* v. *Socialist Workers Party*, *supra*, 440 U.S. at 184," quoted at Petr. App. 36. The Court below specifically found that excluding Anderson from the ballot would abridge his First Amendment rights of expression, since "ballot placement may signal the political viability of a campaign and trigger funding, media coverage and credibility in the minds of voters." *Id.* at 37. The deadline also was found to deny respondents Laufman and others in Ohio who wished to vote for Anderson "the constitutional right to associate for the advancement of political beliefs" and the fundamental right to cast their votes effectively. The Court found that in view of the substantiality of support enjoyed by respondent Anderson across the country, "the number of persons in Ohio and elsewhere whose fundamental rights are implicated by the Ohio deadline is . . . substantial." [8] *Id.* at 39. These

[8] The Court also found that the voting rights of persons such as respondent Eisenstat, a New Jersey supporter of respondent Ander-

burdens, it found, fell with a discriminatory impact since partisan presidential candidates need not be chosen or designated until five months after independents must fully qualify for ballot access. *Id.* at 50-52.

In view of this impact on fundamental rights of voting and freedom of expression and association, the District Court, without holding that the statute was "per se unconstitutional," quite properly held that the filing deadline must be justified as necesary to serve compelling state interests. Notwithstanding that this very standard was articulated and applied by this Court in *Storer* v. *Brown, supra,* and recently reaffirmed in *Illinois State Board of Elections* v. *Socialist Workers Party, supra,* petitioner contends that the District Court should not have required the state to justify its statute *at all* unless it were first shown that the filing deadline could not be met by the "reasonably diligent candidate" under the factual inquiries set out in *Bradley* and *Storer.* This reading of *Bradley* and *Storer* is patently incorrect.

Storer v. *Brown* involved, in part, a constitutional challenge to California's requirements that independent candidates gather and file signatures of 5% of the prior electoral vote within a 24-day period 60 days before the general election. In holding that the trial court had erred in dismissing this challenge, the Court began its analysis by noting that, on their face, California's requirements imposed a burden on the ability of an independent candidate to gain ballot access. 415 U.S. at 740. Applying the

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son, would be diluted if one state, such as Ohio, were able to keep off its ballot a major presidential contender. *Id.* at 38. Contrary to petitioner's assertion, the District Court neither held nor suggested that all state filing deadlines must be uniform to avoid dilution of the rights of voters in other states. The Court noted the impact of the statute on voters in other states as one factor to be considered in determining the burden imposed by this unusually early filing deadline. As respondents argued below, the fact that the vast majority of other states have substantially later filing deadlines does not require identical deadlines in other states, but it *does* suggest that most states have not found it necessary to require independents to commit themselves as early as March 20.

compelling interest standard articulated earlier in its opinion, *id.* at 729, 736, the Court concluded that the factual record was insufficiently developed to permit an appellate decision whether, in fact, the requirements were necessary to serve a compelling state interest. As the Court held, the State "must justify its independent signature requirements chiefly by its interest in having candidates demonstrate substantial support in the community. . . . If the required signatures approach 10% of the eligible pool of voters, *is it necessary to serve the State's compelling interest in a manageable ballot to require* that the task of signature gathering be crowded into 24 days?" *Id.* at 743 (Emphasis added). It emphasized that the issue on remand was "whether it is *essential* to demonstrate community support to gather signatures of substantially more than 5% of the group from which the independent is permitted to solicit." *Id.* at 744.

As a measure, not of the constitutional standard to be applied but of whether the signature requirements together with the time deadlines were "essential" to serve the compelling state interest at issue, the Court set forth the factual inquiry into the ability of a "reasonably diligent candidate" that the State so misreads. *Storer* does not hold that only if a reasonably diligent candidate cannot meet the requirements must the State adduce some compelling interest that is served; rather, it holds that even a compelling interest in requiring demonstrated community support will not justify signature requirements that a reasonably diligent candidate cannot meet. Thus, if a reasonably diligent candidate is unable to obtain the necessary signatures in the time period specified, then the means which the State has chosen to implement its compelling interest are not sufficiently well-tailored to justify the restriction as necessary to achieve the State's goal.

In *Mandel* v. *Bradley*, 432 U.S. 173 (1977), plaintiffs had tried but failed to obtain the required number of signatures on nominating petitions by the filing deadline.

Thus, in *Bradley* as in *Storer* this Court was called on to determine whether the petition signature requirements, in combination with particular time limitations for meeting those requirements, were so burdensome that they were not well-tailored to meet the interest advanced by the State in preventing frivolous candidacies by requiring independent candidates to demonstrate a modicum of community support. The Court held that such an inquiry is essentially factual: if a petition requirement cannot be met in the time periods specified by the State by a "reasonably diligent candidate," looking at such factors as the size of the pool from which signatures can be drawn as well as the time allowed in which to circulate petitions, then it cannot be sustained as "necessary" or "essential" to the State's concededly compelling interests in requiring a demonstration of community support. *Storer* v. *Brown*, *supra*, 415 U.S. at 740, 743-44.

That *Storer* did not reject the compelling interest standard for ballot restrictions is confirmed by the contemporaneous decision in *American Party* v. *White*, *supra*, 415 U.S. at 780. Writing for the eight-man majority, Justice White, who also wrote for the majority in *Storer*, said:

> "We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests."

See id. at 781, n.11, citing *Kusper* v. *Pontikes*, 414 U.S. 51, 56-59 (1973) (applying the compelling state interest requirement). And this Court's most recent ballot access decision, *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra*, 440 U.S. at 184, clearly held that "[w]hen such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." The opinion nowhere refers to the "reasonably diligent candidate,"

and its entire structure, reasoning and holding make clear that a compelling state interest is required to justify restrictive ballot access laws, particularly where, as here, a statute imposes a discriminatory burden on independent candidates not required of partisan candidates.[9]

Thus, the Court below was plainly correct in its conclusion that the reasonably diligent candidate inquiry was not a threshold to be passed before a compelling state interest need be shown but was instead a guide to the determination of those "facts relevant to the legal questions raised by the petitions in *Storer*," that is, whether the particular signature gathering and filing requirements were reasonably necessary to serve the asserted interest in requiring a demonstration of community support.[10] As the Court below pointed out,

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[9] As Judge Gignoux pointed out in the Maine filing case, the reasonably diligent candidate standard

> enunciated in *Storer* and *Mandel* plainly has no application to this case. What the lower courts were called upon to determine in those cases was whether the State's method for assuring that a candidate had a "significant modicum of support," *Jenness* v. *Fortson*, 404 U.S. 431, 442 (1971), was unduly burdensome. In the present case, there is no dispute that Congressman Anderson has sufficient community support to merit placement on the ballot. Nor do plaintiffs claim that the nominating procedures themselves are unduly burdensome. The only issue is whether the State can require an independent candidate for President to begin to pursue his candidacy in Maine before April 1 and to require no equivalent effort by the nominees for president of political parties.

Anderson v. *Quinn, supra*, Rspt. App. 5a-6a n.6.

[10] Petitioner seeks to avoid the clear impact of this Court's consistent holdings that restrictive ballot access laws must be justified by compelling state interests by suggesting that in *Storer*, this test only applied to a disaffiliation statute. Cert. Petn. 8. As indicated above, petitioner's reconstruction of *Storer* is belied by a reading of the opinion itself, as is the astonishing assertion that *Illinois State Board* did not involve First Amendment issues. *Comp.* 440 U.S. at 183-86. Equally astonishing is petitioner's assertion that *Illinois State Board's* Equal Protection analysis has no bearing here. Respondents have consistently argued that Ohio's filing deadline discriminates against independent presi-

> "[A] 'reasonably diligent candidate' could meet the deadline within the meaning of *Storer*, and the deadline could still be constitutionally unsound. For example, if Ohio were to set the filing date in November of the year preceding the general election and require only 100 signatures to qualify for ballot placement, most candidates who had by November decided to run for office would presumably be able to acquire enough signatures, and defendant's *Storer-Bradley* "threshold" test would apparently be satisfied. That fact, however, would not preclude the Court from inquiring whether the State has a compelling state interest in requiring a potential candidate to commit himself so far in advance of the general election." Petr. App. 50-51.

The thrust of petitioner's argument for certiorari is that the District Court should never have reached the question whether Ohio's discriminatory and burdensome early filing deadline is justified by *any* state interest. But the "reasonably diligent candidate" standard was never intended to supplant the requirement that ballot access restrictions burdening fundamental rights must serve important state interests, or to impose some threshold barrier to adjudication of whether such interests are in fact served. The District Court properly applied decisions of this Court, which require a determination of whether there are valid state justifications for such an early filing deadline, and there is thus no reason for this Court to review that decision.

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dential candidates vis-a-vis party candidates who, the State has conceded, need take no steps to establish their candidacy in Ohio prior to receiving their party nominations in the late summer—four to five months after independent candidates must fully qualify for the Ohio general election ballot. And the District Court plainly rested its finding of unconstitutionality not only on the burden imposed by the early filing deadline on respondents' First Amendment and voting rights but also on its discriminatory application.

III. The District Court Correctly Found that Ohio Law Invidiously Discriminates Against Independent Presidential Candidates By Requiring Them To Fully Qualify For Ballot Access Four to Five Months Before Partisan Candidates for the Same Office Are Required to Qualify.

Petitioner persists in its argument that Ohio law in fact treats partisan and independent candidates equally and raises for the first time in this Court a new argument that the proper comparison to be drawn is between independent *candidates* and political *parties*, rather than between the candidates themselves. Neither rationale, however, can overcome the undeniable fact that Ohio's statutes governing ballot access by partisan and independent candidates do accord grossly disparate treatment to the two classes of presidential candidates. Nor should they obscure Ohio's failure in the District Court and here even to suggest a state interest justifying this discrimination.

The State first argues that there is no discrimination because while independent candidates must fully qualify for the general election 75 days before the party primaries, partisan candidates must on that same date cause convention delegates pledged to their support to file nominating petitions. However, as the District Court correctly found, Ohio does *not* require a partisan candidate who may ultimately obtain his party's Presidential nomination and appear on Ohio's ballot to run in its state primary, to nominate any convention delegates, or even to have declared his candidacy by the time the June primary is held. As respondents demonstrated in their Historical Appendix below, recent history abounds with instances where the party Presidential nominee was not even a declared candidate at the time of the early filing deadline here in question, *e.g.*, Hubert Humphrey in 1968. Thus, the court below properly rejected the State's claim that it was in fact treating the partisan and independent candidates themselves equally, noting that

> "The Ohio statutes require the independent to commit himself early in the election year to his independent candidacy and grant the parties, both major and minor, until late August to choose their candidates. Regardless of the likelihood of such an occurrence, the statutes do permit a partisan candidate to receive the nomination of his party and thereby appear on the Ohio general election ballot in November without previously having had to file with the Secretary of State." Petr. App. 43.

Ohio's statutory scheme, in short, recognizes that in the case of political parties, issues and personalities may emerge toward the end of or even after the nationwide primary and caucus process. And it permits the parties considerable flexibility and leeway during the summer months to select their candidates from among shifting intra-party coalitions vying for support against each other. However, Ohio denies such flexibility to independent presidential candidates who must commit themselves to pursue the Presidency by March 20 or be irrevocably banned from Ohio's general election ballot. Whatever discrimination may be involved in requiring independent candidates for statewide office to file at the same time as partisan candidates for those offices—offices for which the partisan candidate is in fact chosen through the primary—the discrimination worked against independent Presidential candidates is far greater because partisan Presidential candidates need not win or even run in Ohio's June primary and in fact need not do anything to qualify for access to the general election ballot in Ohio until four or five months after independents must declare their candidacies and file their signatures.

Without abandoning his contention that partisan and independent presidential candidates are somehow treated equally, petitioner now contends for the first time that the District Court should have focused its comparison on political *parties* and independent *candidates*.[11] Since this

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[11] The District Court did recognize and discuss at length this Court's observations that the states may and in some instances

matter was not urged or considered below, this Court would be more than justified in refusing to consider this argument for the after-the-fact rationale that it plainly is. *Miree* v. *DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976).[12]

However, whether the comparison is made between candidates or between political parties and supporters of independent candidates, the same result obtains. Under Ohio law, those persons associated as a political party retain, collectively, the freedom to designate the party's choice until the time of the party convention. Those persons, like respondents Laufman, Hetrick and Eisenstat, who wish to associate, not for the purpose of forming a political party but for the purpose of promoting election of an independent candidate, such as respondent Anderson, and of his political program and

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must treat independent and partisan candidates differently, *see, e.g.*, *Jenness* v. *Fortson*, 403 U.S. 431, 441-42, (1971), and carefully considered both the differences and similarities between independent and partisan candidates and the methods for ballot placement afforded by Ohio law. *See* Petr. App. 44-46. As the Court explained, "[N]otwithstanding the extreme importance of the partisan candidate's affiliation with the support superstructure and machinery of a political party, a critical element of his success or failure at the general election is the personal constituency which must rally to his cause . . . . Likewise an independent candidate looks to develop a constituency that is attracted to him as an individual as well as to his stance on the issues." *Id.* at 45. While recognizing that "[o]ne cannot compare for all purposes the independent candidate with the candidate who conducts his campaign within the party system . . . . It seems equally clear . . . that statutory line-drawing that operates to abridge fundamental rights of some persons must be explicable in terms of differences between the persons on either side of the line." *Id.* The Court concluded that independent and partisan candidates were sufficiently similar that the difference in filing deadlines had at least to be justified.

[12] Petitioner's effort to raise a new ground in support of its position below is particularly inappropriate in view of its refusal to seek expedited review in the Court of Appeals so as to permit this Court the benefit of the appellate court's views on this new line of argument.

ideas, are required by Ohio law to have made and effectuated their choice in terms of ballot access for the general election by March 20. Whichever way the comparison is drawn, then, it appears plain that Ohio law draws an unconscionable distinction between the independent and partisan Presidential candidates.

In an effort to create a cert-worthy issue, the State suggests that under the District Court's reasoning "any filing deadline which fell in advance of the national party conventions" would be unconstitutionally discriminatory. Cert. Petn. 19. *See also id.* at 16. However, the District Court nowhere suggested and respondents do not argue that any filing deadline for independent candidates that falls before the time when party candidates are nominated is necessarily unconstitutional. For example, evenhanded administrative requirements for verifying independents' petition signatures involving challenges may justify a filing deadline days or even weeks in advance of the date when partisan candidates achieve placement on the ballot. But no such interests were advanced below by petitioner nor are any such interests advanced before this Court.[13]

In sum, here, as in Maryland, New Mexico and Maine, state law places grossly discriminatory requirements on independent candidates vis-a-vis partisan candidates as to when they must declare their candidacies to qualify for ballot access. Under well-established equal protection

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[13] Petitioner's ultimate suggestion that "independent candidacies and partisan candidacies are in salient ways so completely dissimilar that the comparison for the purpose of determining the existence of a violation of the guarantee of equal protection is nearly meaningless" is strikingly inconsistent with numerous decisions of this Court and of the lower federal courts, *see, e.g., Williams* v. *Rhodes, supra; Illinois State Board of Elections* v. *Socialist Workers Party, supra; Toporek* v. *South Carolina State Election Comm'n*, 362 F. Supp. 613 (D.S.C. 1973) (three-judge court); *McCarthy* v. *Noel*, 420 F. Supp. 799 (D.R.I. 1976), and indeed, with petitioner's own position below that the March 20 filing deadline for independent candidates was necessary to assure equality of treatment with partisan candidates.

analysis, it is this difference in requirements that must be justified by a compelling state interest in order to sustain the different treatment involved. Here, as in those other states, petitioners advance *no* compelling state interest whatsoever for the *difference* in treatment. And, here, as in Maryland, New Mexico and Maine, respondents submit that the District Court was plainly correct in holding this failure to be fatal to the validity of the filing deadline as applied to independent candidates for the Presidency.

IV. The District Court Correctly Determined That Ohio's Filing Deadline Was Not Intended to And Does Not Serve the State's Concededly Compelling Interest in Preserving Political Stability.

Petitioner made no effort in the District Court to justify its filing deadline on legitimate grounds of administrative necessity, conceding that the independent nominating petitions are not even forwarded to the boards of elections for the first step in processing until June 15, three months after the filing deadline and a month after Congressman Anderson's supporters tendered their petitions. Nor has petitioner sought to justify the filing deadline as necessary to serve its interests in requiring independent candidates to demonstrate substantial community support, an interest served and met in this case by the petition signature requirements. Thus, the only interest currently asserted in support of the filing deadline is that of promoting political stability by assuring the true independence of persons running as nonpartisan candidates for office by requiring them to make an early choice of whether to run as an independent. In so arguing, however, petitioner simply ignores the District Court's findings of fact that Ohio's filing deadline was not intended to and does not function to serve political stability interests.

When fundamental rights are at stake, this Court has made clear that legislation to limit them must stand or fall on the actual intentions of the legislation, not after-

the-fact rationalizations by counsel. As this Court has often emphasized, "This court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 649 n.16 (1975); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974).

Although the court below specifically recognized *Storer's* holding that a "state has . . . a legitimate and compelling interest in maintaining the stability of its political processes," it found that the Ohio deadline was not intended to serve that interest. As the Court noted: "The statute gives absolutely no indication on its face that it was intended to be a disaffiliation provision." On its face, the filing deadline is just that—a filing deadline, and not a disaffiliation, "sore loser" or other requirement more directly designed to serve the goals of protecting political stability. *Accord*, *Anderson* v. *Quinn*, *supra*, Rspt. App. 7a-8a. Indeed, Ohio has a separate "sore loser" statute to serve its interest in the integrity of its party primaries, Ohio Rev'd Code § 3513.04, which Congressman Anderson fully satisfied and which petitioner concedes does not bar his independent candidacy.[14]

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[14] Petr. App. 68, ¶ 6, 7; Ohio Rev'd Code § 3513.30 (permits presidential candidates to withdraw from primary up to 30 days before). Orginally, the State's principal argument in the court below was that the filing deadline served "political stability" goals because it had been intended to work in tandem with the "sore loser" provision, § 3513.4. The State's claim that the two were intended to work as part of a comprehensive scheme was based on the proposition that the sore loser provision was intended to apply only to those nonpartisan offices and write-in candidates not covered by the early filing provisions of § 3513.257. As respondents demonstrated below, however, the State's purported interpretation of its sore loser provision was inconsistent not only with the plain language of its statutes but also with every Ohio state court decision and Attorney General opinion on the subject. Moreover, the sore loser provision was enacted in 1923, 110 Ohio Laws 131, over one-

The State's assertion of a political stability purpose for its early filing deadline is also belied by both its legislative history and by other provisions of state law. Until 1951, Ohio's filing deadline for independent candidates was 60 to 90 days before the general election. In that year, it was changed from 90 days before the general election to 90 days before the primary. 124 Ohio Laws 673. At the same time, many other changes were made in Ohio's ballot access laws. 123 Ohio Laws 380; 123 Ohio Laws 673. As this Court thereafter held in *Williams* v. *Rhodes*, 393 U.S. 23 (1968), these changes were not motivated by any legitimate or compelling state interest but rather were a direct reaction to the 1948 independent Presidential candidacy of Henry A. Wallace and had the purpose and effect of eliminating independent candidacies in Ohio for the next 20 years. Although Ohio's ballot access provisions were modified after having been declared unconstitutional in *Williams* v. *Rhodes*, *supra*, they were struck down again in *Socialist Labor Party* v. *Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972), where the court observed that "the post-*Williams* amendments to the election laws merely perpetuate the restrictive laws enacted between 1948 and 1952." *Id.* at 1269. Ohio's laws have again been amended but, as the Court below found, the early filing deadline "emerged virtually unscathed," a remnant of the restrictive scheme held unconstitutional in *Williams* v. *Rhodes*. Petn. App. 34-35.

Ohio's political stability argument obscures the fact that the Ohio General Assembly *has* made legislative and political judgments in the context of Ohio's electoral scheme as to what provisions were necessary to protect the integrity of the primary process and to assure the

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quarter of a century before Ohio first moved its filing deadline for independents to a date before the primary. At oral argument, the State virtually abandoned its claim relating to this alleged state interest, and the District Court rejected the argument with little discussion. Petr. App. 55-56 & n.8.

true independence of nonpartisan candidates. These interests are implemented in a sore loser clause that is precisely tailored and that does not bar Congressman Anderson from Ohio's general election ballot. The filing deadline, on its face, as well as in view of its history, was not intended to serve those purposes.

Not only was the statute not intended to serve these goals but it does not serve them in practice. As the Court pointed out, "Anderson apparently could run in the other 49 states as a Republican and RC 3513.257 would not bar him from running as an independent in Ohio so long as he filed here as such by March 20." Petr. App. 54. Indeed, had Congressman Anderson made his decision to pursue an independent candidacy in March, notwithstanding his participation in other state Republican primaries, or his receipt of federal matching funds as a primary contestant, he would have been fully eligible for the ballot in Ohio.

An early filing deadline thus bears no logical relationship to the character of the candidate as a true independent or to the concerns noted by this Court in *Storer* as justifying California's one-year disaffiliation provision. As Judge Gignoux pointed out in rejecting a similar argument advanced in support of Maine's April 1 filing deadline, a "deadline is wholly ineffective as a disaffiliation provision. On its face, it does not prohibit candidates affiliated with a political party, like Anderson, from running as independents as long as they meet the deadline. And it does prohibit genuinely unaffiliated candidates from running as independents if they fail to meet the deadline." *Anderson* v. *Quinn*, *supra*, Respt. App. 8a.[15] As a purported mechanism to assure political stability by assuring true independence, then, the filing deadline is both overbroad and under-inclusive.

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[15] The Court below similarly observed that "R.C. 3513.257 would not bar the staunchest party member who decided on March 19 to change horses and file as an independent, for example, nor would it permit a true independent to run, if he or she filed on March 21." Petr. App. 54.

Accordingly, as the District Court concluded, "unlike the California provisions upheld in *Storer*, which were plainly drafted to effect a comprehensive and nondiscriminatory disaffiliation scheme . . . RC 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." [16] Petr. App. 54.

Finally, even if the filing deadline had been intended to serve political stability ends and did serve such ends in elections for statewide office, it would still be impermissible under the analysis in *Storer*. There, this Court upheld California's one-year disaffiliation requirement as applied to independent candidates, on the grounds that it was necessary to serve California's compelling state interest in assuring the integrity of the party primary process. But the circumstances here are entirely different from those upheld in *Storer*. The foundation for the Court's upholding the disaffiliation provision in California was that (1) disaffiliation provisions applied across the board to all candidates, partisan or independent, for the same office, and (2) the party primary was, in California, the integral first step in a two-step process for choosing state officers. Neither of these conditions is present here.

Plaintiffs challenging the disaffiliation provision in *Storer* were two Congressional candidates denied ballot access under California's disaffiliation provision because of prior party membership. As this Court emphasized,

> "The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents. Indeed, the independent candidate must be clear of political party affiliations

[16] Moreover, insofar as the State is seeking to promote efforts at intra-party compromise, an early filing deadline is plainly counterproductive, penalizing those who, like respondent Anderson, initially seek to pursue their goals and positions within a political party.

> for a year before the primary; the party candidate must not have been registered with another party for a year before he files his declaration, which must be done not less than 83 and not more than 113 days prior to the primary."

415 U.S. at 733-34.

Here, by contrast, the Ohio filing deadline is inapplicable to partisan nominees for President. It prevents only independents, and not partisan candidates, from making late ballot decisions.[17] Thus, unlike the statute in *Storer*, Ohio's deadline is discriminatory and is not a neutral provision expressive of a general state policy, falling equally on partisan as well as independent candidates.

Second, and equally important, the *Storer* Court upheld the disaffiliation provision notwithstanding its substantial burden on candidate and voter rights because of what it concluded was the State's clear, compelling and "general" policy of requiring the resolution of intra-party disputes through the primary. As the Court wrote,

> The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire selection process . . . by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences.

415 U.S. at 735.

Again, the contrast to the role of the primary in the Presidential selection process is marked. Unlike a pri-

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[17] Under Ohio law, for example, a Presidential candidate who participates in a major party primary may nonetheless "jump" the party and appear on the November general election ballot as the candidate of a *minor* party, provided his name is certified to the Secretary of State within 75 days of the general election. Ohio Rev'd Code § 3505.10.

mary for state-wide office—at which the winners of the primary are the candidates who will appear on the ballot —the winner of a party primary for President has no guaranty of being that party's ultimate nominee.[18] The function of the presidential preference primaries, in those states that have them, is as a "warm-up," not for the general election, but for a party convention at which delegates—some bound to vote for the winner of a preference primary or caucus, others not—gather together in the summer to select the party nominee. In view of the small role of any one primary in selecting party presidential nominees, the state's interest in requiring independent candidates to make an "early choice" between the primary and independent route takes on an entirely different, and diminished, meaning in the Presidential context.[19] As the Court below stated:

> [T]he defendant has not been persuasive that the compelling state interest which the Supreme Court found in the context of a statewide election in Part I of *Storer* is equally compelling in an election for the national office of President. . . . When the defendant argues that the burden placed on Congressman Anderson by R.C. 3513.257 is minimal compared to the one-year disaffiliation requirement exacted by California, he strains to force a national peg into a state hole.

Petr. App. 55.

As the District Court found, however, the filing deadline was not in fact intended to and does not serve the asserted interests in political stability. The issue of what the

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[18] Ohio, like every other state, recognizes the need to accomodate this process, which may even yield dark-horse convention nominees; a party nominee in Ohio will thus appear on the ballot regardless of his participation or success in the state primary.

[19] Indeed, California does not even apply its disaffiliation provision, upheld in *Storer*, to Presidential candidates or electors, in recognition of the entirely diminished role of the state primary in the selection of presidential nominees; nor is any other state to our knowledge seeking to bar Congressman Anderson from the general election ballot on grounds of a disaffiliation provision.

State of Ohio *could* do under *Storer's* rationale to promote the stability of its political system in the Presidential context is thus entirely academic.

V. The Summary Affirmance in *Sweetenham* v. *Rhodes* Does Not Control Disposition of this Case.

Petitioner's claim that this case is governed by the Supreme Court's summary affirmance of *Socialist Labor Party* (*Sweetenham*) v. *Rhodes*, 318 F.Supp. 1262 (S.D. Ohio 1970), *aff'd sub. nom. Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972), ignores settled principles as to the reach of a summary affirmance. *See, e.g., Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975); *Illinois State Board of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 180-83. Indeed, this Court has warned of an over-expansive reading of its summary actions: "The precedential significance of the summary action . . . is to be assessed in the light of all of the *facts* in that case. . . ." *Mandel* v. *Bradley, supra*, 432 U.S. at 177 (emphasis added). Thus, "[t]he precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions,'" *Illinois State Board of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 182, quoting *Mandel* v. *Bradley, supra*, 432 U.S. at 176.

The precedential effect of *Socialist Labor Party* v. *Rhodes, supra*, must therefore be determined by reference to its facts. Plaintiffs, independent candidates for Congress, challenged then-existing provisions of Ohio law requiring them to file their nominating petitions 90 days prior to the May 1970 primary election. Plaintiffs had taken *no* steps to become candidates before that election; indeed, the first date by which such plaintiffs reported any progress toward complying with the nominating procedures was at the end of June, almost two months after the primary. The three-judge court, without ruling on the validity of the filing deadline itself, concluded that plaintiffs "who did not officially declare their candidacy *at or before* the time Ohio requires politi-

cal parties to choose their nominees are not entitled to ballot position." *Id.* (Emphasis added.) Here, by contrast, respondent Anderson declared his candidacy almost seven weeks before the Ohio primary, and tendered all his nominating papers on May 16, over three weeks prior to the primary and months before the party Presidential candidates are chosen.

Petitioner's assertion that the specific challenge presented in the jurisdictional statement and ruled on by this Court should be determined solely by reference to the "questions" framed by the parties, without regard to the facts in the case, is plainly incorrect. *Mandel* v. *Bradley*, *supra*, 432 U.S. at 177. The only question "necessarily decided" by the three-judge court in *Sweetenham* was that plaintiffs, who had not taken steps to become candidates prior to the time when partisan candidates were selected, 318 F. Supp. at 1273, were not entitled to relief. Because the plaintiffs tendered no nominating petitions prior to the primary, the district court never reviewed or ruled on the validity of the Ohio filing date; it held only that a state may require that candidates qualify for ballot position "at a designated time prior to an election." For this reason alone, the summary affirmance in *Sweetenham* plainly is not dispositive here.

Moreover, it is clear that the issue of discrimination between independent and partisan Presidential candidates was not and could not have been at issue in *Sweetenham*. Plaintiffs there were contenders for statewide office, whose partisan rivals were in fact chosen at the primary election. Thus, in *Sweetenham* the filing deadline was in fact identical for all partisan and independent candidates, whereas partisan Presidential candidates need not be designated for Ohio's general election ballot until the end of August—five months after the filing deadline for independents. In *Illinois State Board of Elections* v. *Socialist Worker Party*, *supra*, despite a prior summary affirmance of a decision upholding the same 5% signature requirement for independent

mayoral candidates there at issue, this Court concluded that because a different equal protection challenge was involved in the later suit the prior summary affirmance was not dispositive. Here, too, the discrimination between independent and partisan Presidential candidates was neither raised or considered in *Sweetenham* and for this reason as well *Sweetenham* does not control.

CONCLUSION

For the foregoing reasons, the petition for certiorari prior to judgment in the Court of Appeals should be denied.

Respectfully submitted,

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September 6, 1980

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 80-0176 P

JOHN B. ANDERSON, STEPHEN P. KELLEY, JAMES D. HARRINGTON, and GERALD M. EISENSTAT,
Plaintiffs

v.

RODNEY S. QUINN, in his official capacity as Secretary of State of the State of Maine,
Defendant

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

Congressman John B. Anderson is an independent candidate for President of the United States in the November 1980 general election. He declared his independent candidacy on April 24, 1980. In this action Anderson and three of his supporters[1] challenge the constitutionality of a Maine statute, 21 Me. Rev. Stat. Ann. § 494(9), which requires an independent candidate for President of the United States to file a nominating petition with the Secretary of State of Maine by April 1, 1980—181 days prior to the date when political parties are required to certify their nominees for Presidential electors to the Secretary of State and 217 days before

[1] Plaintiff Stephen P. Kelley, a registered Maine voter, seeks certification as a candidate to appear on the November 1980 ballot as a Presidential elector for Anderson. Plaintiff James D. Harrington, a registered Maine voter, desires to cast his vote in the November 1980 election for the electors pledged to Anderson. Plaintiff Gerald M. Eisenstat, a registered New Jersey voter, intends to cast his vote in the November 1980 general election for the electors pledged to Anderson in New Jersey.

the November 4, 1980 general election.[2] The statutory filing deadline prevents the placement of Anderson's name on the November ballot as an independent candidate for President. Anderson and his supporters charge that, as a result, the filing deadline impermissibly burdens their constitutional rights to associate for the advancement and expression of political beliefs and effectively to exercise their franchise for the Presidential candidate of their choice, as guaranteed by the First and Fourteenth Amendments, and invidiously discriminates against plaintiffs and others similarly situated, denying them the equal protection of the laws secured by the Fourteenth Amendment.[3] Plaintiffs seek a declaratory judgment that 21 Me. Rev. Stat. Ann. § 494 (9) is unconstitutional, null and void as applied to independent candidates for President, or alternatively as applied to the independent candidacy of Congressman Anderson. Plaintiffs also seek a permanent injunction enjoining the defendant Secretary of State of Maine[4] from enforcing the filing deadline against Anderson, and a reasonable attorney's fee pursuant to 42 U.S.C. § 1988. Jurisdiction is properly asserted under 28 U.S.C. §§ 1331, 1343(3) and 2201, and 42 U.S.C. § 1983.

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[2] Anderson and his supporters have successfully challenged the constitutionality of state statutory filing deadlines in at least three other federal courts. *See* Anderson v. Hooper, No. 80-432-M Civil (D. N.M. July 8, 1980) (preliminary injunction); Anderson v. Celebrezze, No. C-2-80-400 (S.D. Ohio July 21, 1980) (final judgment); Anderson v. Morris, Civ. No. Y-80-1632 (D. Md. August 6, 1980) (final judgment).

[3] Plaintiffs also contend that the early filing deadline violates the Supremacy Clause, U.S. Const. art. VI, and should be struck down as the result of a "malfunction of the legislative process." The Court finds it unnecessary to reach these additional arguments.

[4] Defendant Rodney S. Quinn, Secretary of State of the State of Maine, is charged with administering the relevant sections of the Maine election law.

The matter is before the Court on plaintiffs' motion for summary judgment and a stipulation of facts. The legal issues have been comprehensively briefed and argued.

For the reasons to be stated, plaintiffs' motion for summary judgment is granted.

I

The significant facts may be briefly summarized. Until April 24, 1980 Congressman Anderson was an active candidate for nomination by the Republican party for President of the United States. On April 24, 1980, he announced his independent candidacy for President. Subsequent to that date his supporters gathered the number of signatures of registered Maine voters required by Maine law for nominating petitions to place Anderson's name on the general election ballot in November and submitted them to municipal registrars for certification by 5:00 p.m., June 5, 1980, as required by 21 Me. Rev. Stat. Ann. § 494(8). On June 9, the first working day after the last of the certified petitions were received from the municipal registrars, the nominating petitions, containing approximately 6,000 certified signatures, were tendered to the office of the Secretary of State, together with the consent forms required by 21 Me. Rev. Stat. Ann. § 495. The state officials rejected the petitions and consent forms on the sole ground that they were not timely filed under 21 Me. Rev. Stat. Ann. § 494(9). Pursuant to an agreement between the parties, while rejecting the petitions as untimely, the state officials accepted custody of them and have processed them in accordance with the usual procedures. The Secretary of State has determined that, apart from their noncompliance with the April 1 filing deadline, the nominating petitions and consent forms comply with the requirements of Maine law and contain a sufficient number of signatures to qualify Anderson for placement on the

general election ballot in November. The parties agree that Anderson would have been certified as an independent candidate for President and placed on the general election ballot, but for the April 1 filing deadline prescribed by 21 Me. Rev. Stat. Ann. § 494(9).

II

The Supreme Court has firmly established that "[r]estrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.' " *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)). The Court has also repeatedly held that substantial burdens on these rights are invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. *Illinois State Board of Elections* v. *Socialist Workers Party, supra; American Party of Texas* v. *White*, 415 U.S. 767, 780-81 (1974); *Storer* v. *Brown*, 415 U.S. 724, 729 (1974); *Williams* v. *Rhodes, supra* at 31. And, in its most recent ballot access decision, the Supreme Court emphasized that " 'even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,' *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that States adopt the least drastic means to achieve their ends." *Illinois State Board of Elections* v. *Socialist Workers Party, supra* at 185.

The restriction on an independent Presidential candidate's access to the ballot imposed by Maine's April 1 filing deadline substantially burdens the associational and franchise rights of independent candidates and their supporters, and also effects an invidious discrimination. An independent candidate must decide to run as an

independent, gather sufficient certified signatures, and file with the Secretary of State by April 1. In practice, the deadline bars an otherwise viable independent candidate from the Maine general election ballot solely because he decides to run after April 1. Maine imposes no similar burden on party candidates for the Presidency. Maine does not require party candidates for President to qualify or declare their candidacies by any particular date, and permits the names of party Presidential electors to be certified to the Secretary of State as late as September 30.[5] Clearly, then, Maine's April 1 filing deadline as applied to independent candidates for the President places a substantial and unequal burden on them.

Only a compelling state interest can justify the substantial and unequal burden imposed by Maine's April 1 filing deadline upon independent candidates for President.[6] Yet the State has failed to show any compelling

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[5] The Maine election laws require that the names of Presidential electors nominated by a political party be certified to the Secretary of State within 60 days after the state convention, 21 Me. Rev. Stat. Ann. § 402(2), which must be held between March 1 and August 1 of the election year. *Id.* § 401. Political parties are not required to certify their Presidential and Vice Presidential candidates to the Secretary of State by any particular date.

[6] The State argues that the traditional "compelling state interest" analysis in ballot access cases has been superseded by the "reasonably diligent candidate" standard set forth by the Supreme Court in Storer v. Brown, *supra*, and Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). In *Storer* and *Mandel*, plaintiffs had tried and filed to obtain the required number of signatures on nominating petitions by the filing deadline. The Supreme Court remanded both cases for further factual development in the lower courts, with instructions to determine whether, in the context of the particular State's politics, "a reasonably diligent independent candidate" could be expected to satisfy the ballot access requirement. Storer v. Brown, *supra* at 742; Mandel v. Bradley, *supra* at 177-78. The standard enunciated in *Storer* and *Mandel* plainly has no application to this case. What the lower courts were called upon to determine

interest, or even a rational justification, for the April 1 filing deadline. The State does not contend that Congressman Anderson has failed to satisfy the State's interest in keeping a frivolous candidate off the ballot by assuring that he is a serious candidate with a significant level of support, the state interest the Supreme Court has most frequently recognized as justifying ballot access restrictions. *See, e.g., Illinois State Board of Elections* v. *Socialist Workers Party, supra* at 184-85; *American Party of Texas* v. *White, supra* at 782 n.14; *Lubin* v. *Panish*, 415 U.S. 709, 715 (1974); *Jenness* v. *Fortson, supra* note 6, at 442. Nor does the State assert that an April 1 filing deadline is required to provide adequate time to verify petitions and print ballots, another state interest which has been recognized by the courts. *See, e.g., Salera* v. *Tucker*, 399 F. Supp. 1258, 1267 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). Rather, Maine maintains that two other state interests are served by the restriction imposed by the April 1 filing deadline.

First, the State claims that the filing deadline advances "the State's interest in treating all candidates within the State's practical power to regulate equally." The State's assertion is that it cannot regulate the man-

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in those cases was whether the State's method for assuring that a candidate had a "significant modicum of support," Jenness v. Fortson, 404 U.S. 431, 442 (1971), was unduly burdensome. In the present case, there is no dispute that Congressman Anderson has sufficient community support to merit placement on the ballot. Nor do plaintiffs claim that the nominating procedures themselves are unduly burdensome. The only issue is whether the State can require an independent candidate for President to begin to pursue his candidacy in Maine before April 1 and require no equivalent effort by the nominees for President of political parties. Moreover, any doubt as to the continued viability of the "compelling state interest" test where petition filing requirements are challenged has been dispelled by the Supreme Court's most recent ballot access decision, Illinois State Board of Elections v. Socialist Workers Party, *supra* at 184.

ner in which party Presidential candidates are selected because of the Supreme Court's decision in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), and that therefore the filing deadline can be justified because it treats equally all candidates within the State's power to regulate. This argument borders on the frivolous. Plainly, the burdens imposed on independent Presidential candidates must be compared with those imposed on other candidates for the same office, not with candidates for other offices who are elected through an entirely different process.[7]

The second interest asserted by the State is "the State's . . . interest [in] the protection of the integrity of the independent route to the ballot." The State's position is that it has a valid interest in assuring that independent candidates are indeed independent, and therefore in preventing an unsuccessful party candidate from pursuing a second route to the general election ballot. *See Storer* v. *Brown*, *supra* at 733. In effect, the State argues that the April 1 filing deadline acts as a disaffiliation requirement to prevent persons who, having failed to obtain a party nomination, then seek to run as independents. *See id.* at 733-36. *See also Kusper* v. *Pontikes*, *supra* at 59-61; *Rosario* v. *Rockefeller*, 410 U.S. 752, 760-62 (1973). The short answer to this contention is that the filing deadline plainly was not in-

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[7] Party candidates for statewide elective offices in Maine secure a place on the general election ballot by winning a party primary. To qualify for the primary, they must file nominating petitions by April 1. By a 1979 amendment to the Maine election laws, ch. 359, 1979 Maine Acts 443, the Maine legislature required independent candidates to file by the same date "to Make Equal Application of Legal Requirements for Independents, Democrats and Republicans in all Respects." *Id.* The effect was to establish the same filing date for nominating petitions both for candidates in the primaries, *see* 21 Me. Rev. Stat. Ann. §§ 444 & 445(8) and for independent candidates. *Id.* § 494(9). There is no primary election in Maine for candidates for President, Vice President or Presidential elector.

tended to serve as a disaffiliation requirement,[8] and it does not serve that purpose in practice. The legislative purpose of Section 494(9), as conceded by the State, was to establish a filing deadline for independent candidates identical to that for party candidates running in primaries. Legis. Doc. 1136, 109th Legis., 1st Sess. (1979) (Statement of Fact). Concerns over the disaffiliation of independent candidates were addressed by the Legislature in entirely different statutory provisions, 21 Me. Rev. Stat. Ann. §§ 135(2) & 493; they had nothing to do with the imposition of the deadline. Although enacted by the same Act, ch. 359, 1979 Me. Acts 443, there is no indication in the legislative history that Section 494(9) and the disaffiliation provisions were not separate measures with distinct purposes. *See* Legis. Doc. 1136, *supra*; 1979 Me. Legis. Rec. 1024, 1111. Moreover, the deadline is wholly ineffective as a disaffiliation provision. On its face, it does not prohibit candidates affiliated with a political party, like Anderson, from running as independents as long as they meet the deadline. And it does prohibit genuinely unaffiliated candidates from running as independents if they fail to meet the deadline.

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[8] Indeed, the record suggests that the Maine legislature did not intend to impose any disaffiliation requirement on independent candidates for President and Vice President. The sole reason for imposing the disaffiliation requirement on independent candidates mentioned in the legislative history was to create a restriction equivalent to that imposed on candidates in party primaries, who are required by 21 Me. Rev. Stat. Ann. § 134(3) to be affiliated with the party in whose primary they are running. *See* 1979 Me. Legis. Rec. 1024 (Remarks of Rep. Tarbell). There is no equivalent requirement imposed on party candidates for the Presidency and Vice Presidency. Furthermore, the Maine Attorney General's office has determined that 21 Me. Rev. Stat. Ann. § 493, the disaffiliation statute for independents, does not apply to candidates for President and Vice President, although the reasons for that interpretation do not appear in the record.

Since the April 1 filing deadline imposed upon independent candidates for President effects substantial and unequal burdens on plaintiffs' rights of association and franchise and is not justified by any compelling state interest, the Court holds 21 Me. Rev. Stat. Ann. § 494 (9) unconstitutional as applied to the independent candidacy of Congressman John B. Anderson for President of the United States.

III

In accordance with the foregoing, plaintiffs' motion for summary judgment is granted, and judgment will be entered:

(1) Declaring the deadline for filing nomination petitions and consent forms on behalf of independent candidates prescribed in 21 Me. Rev. Stat. Ann. § 494 (9) is unconstitutional, null and void as applied to the independent candidacy of plaintiffs John B. Anderson for President of the United States; and

(2) Permanently enjoining defendant Rodney S. Quinn, his agents, servants, employees, subordinates, and all other persons acting in concert with him, from enforcing or applying the filing deadline set forth in 21 Me. Rev. Stat. Ann. § 494(9) as a ground for failing or refusing to certify the names of plaintiff Anderson and his running mate for Vice President for inclusion on the official Maine general election ballot as independent candidates for President and Vice President in the general election to be held on November 4, 1980.

IT IS SO ORDERED.

Dated at Portland, Maine, this 11th day of August 1980.

/s/ Edward G. Gignoux
United States District Judge

A TRUE COPY

ATTEST:

William S. Brownell
Clerk

By /s/ Patricia Puschock
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 80-0176 P

JOHN B. ANDERSON, STEPHEN P. KELLEY, JAMES D. HARRINGTON, and GERALD M. EISENSTAT,
Plaintiffs

v.

RODNEY S. QUINN, in his official capacity as Secretary of State of the State of Maine,
Defendant

DECLARATORY JUDGMENT AND INJUNCTION

Consistent with the Opinion and Order of this Court dated August 11, 1980, it is hereby

ORDERED, ADJUDGED and DECREED that:

1. The deadline for filing nomination petitions and consent forms on behalf of independent candidates prescribed in 21 Me. Rev. Stat. Ann. 494(9) is unconstitutional, null and void as applied to the independent candidacy of plaintiff John B. Anderson for President of the United States; and

2. The defendant Rodney S. Quinn, Secretary of the State of Maine, his agents, servants, employees, subordinates, and all other persons acting in concert with him are permanently enjoined from enforcing or applying the filing deadline set forth in 21 Me. Rev. Stat. Ann. § 494(9) as a ground for failing or refusing to certify the names of plaintiff John B. Anderson and his running mate for Vice President for inclusion on the official Maine general election ballot as independent candidates for President and Vice President in the general election to be held on November 4, 1980.

Dated at Portland, Maine, this 11th day of August 1980.

/s/ Edward G. Gignoux
United States District Judge

A TRUE COPY

ATTEST:

William S. Brownell
Clerk

By /s/ Patricia Puschock
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-80-1632

JOHN B. ANDERSON; D. A. BERT BOOTH;
KEVIN P. MCCLEAF; GERALD M. EISENSTAT

v.

WILLARD A. MORRIS, State Administrator of the Election Laws; THEODORE N. CLARK, Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON, Vice-Chairman of the State Administrative Board of Election Laws; REGINALD A. ASPLEN, Member of State Administrative Board of Election Laws; KAREN LANCASTER, Member of the State Administrative Board of Election Laws; SYLVIA RAPHAEL, Member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

Filed: August 6, 1980

Henry R. Lord, Esquire, Michael C. Powell, Esquire and Thomas J. Gisriel, Esquire, Baltimore, Maryland, and Mitchell Rogovin, Esquire, George T. Frampton, Jr., Esquire, and Ellen M. Semonoff, Esquire, Washington, D.C. for Plaintiffs.

Stephen H. Sachs, Esquire, Attorney General, George A. Nilson, Esquire, Assistant Attorney General, Diana G. Motz, Esquire, Assistant Attorney General and Robert A. Zarnoch, Esquire, Assistant Attorney General for Defendants.

YOUNG, United States District Judge

John B. Anderson, Independent candidate for President of the United States, has filed suit against Maryland

election officials challenging the constitutionality of state laws which prevent him from being on the general election ballot. Joining him as plaintiffs are D. A. Bert Booth, a registered voter in Maryland who wishes to vote for Anderson, Kevin P. McCleaf, a Maryland registered voter and elector pledged to Anderson, and Gerald M. Eisenstat, a registered voter in the State of New Jersey who intends to vote for Anderson. Cross motions for summary judgment have been filed based on a joint stipulation of facts submitted by the parties. For reasons stated below, judgment will be entered for the plaintiffs. Because the Court finds the burdens on plaintiff Anderson's rights to be an adequate basis for its decision, no separate consideration has been given to the claims by the other plaintiffs.

I. THE FACTS

On June 8, 1979, plaintiff Anderson declared his candidacy for the Republican Party nomination for President. By letter of March 4, 1980, Maryland Secretary of State Fred L. Wineland notified the plaintiff that, pursuant to Ann. Code of Maryland, Article 33, § 12-2(a)(1), Anderson's name would be placed on the Republican primary ballot in Maryland unless prior to March 21 the plaintiff filed an affidavit stating he was not a candidate for the nomination.[1]

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[1] Article 33, § 12-2(a)(1) provides as follows:

(a) *Manner of becoming candidate for nomination for President; procedure for casting votes as uncommitted; withdrawal of candidacy.*—Whenever a party uses a primary election to nominate a candidate for President of the United States, any person who desires to run in the primary election may become a candidate for nomination only:

(1) By direction of the Secretary of State who shall place the name of the candidate upon the ballot no sooner than 70 days for later than 53 days preceding the date set by law for the primary election when he has determined in his sole discretion that the

On April 24, 1980, the plaintiff publicly announced that he would pursue his candidacy for the presidency as an Independent. At the same time, he renounced his previously declared intention to seek the Republican Party's nomination for that office, although stating that he would remain a member of the Republican Party. He also notified Maryland Secretary of State Wineland of his withdrawal. On April 28, Secretary of State Wineland informed Anderson that his name would remain on the ballot, because the plaintiff had not withdrawn from the race before the deadline specified by law (March 21). Article 33, § 12-2(a)(4).

Following Anderson's announcement, a group of his supporters in Maryland began efforts to secure the necessary signatures of registered voters to place his name on the general election ballot as an Independent candidate for President. Between May 19 and July 7, 1980, Anderson supporters gathered approximately 89,019 signatures of persons purporting to be Maryland registered voters and submitted them to local boards on July 8, 1980. Under Maryland law, 55,517 valid signatures must be submitted (three percent of all registered voters in the state); one third must be submitted by March 3, 1980, while the remainder are due August 4.[2] Article 33, § 7-1.

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candidate's candidacy is generally advocated or recognized in the news media throughout the United States or in Maryland, in accordance with the national party rules, unless the candidate executes and files with the Secretary of State an affidavit stating without qualification that he is not and does not intend to become a candidate for the office in the Maryland primary election;

* * * *

[2] The first deadline is determined from the date of the primary election (seventy days before), Article 33 §§ 7-1(c)(1) and 4A-3, while the latter date is set as the first Monday in August. Article 33, § 7-1(c)(2). Thus, in a non-presidential election year, when the primary is held in September, the first deadline would be considerably closer to the general election.

Maryland law also requires than an Independent's certificate of candidacy be filed by March 3—the date most candidates for primary elections must file.[3] Article 33, § 4A-3.

The defendants, who are responsible for administering Maryland's election laws, will not place plaintiff Anderson's name on the general election ballot on the grounds that a certificate of candidacy and a sufficient number of signatures were not filed timely by the March 3 deadline, as required by Article 33, § 7-1. It is conceded, however, that Anderson is qualified as a person who "may be nominated by petition" pursuant to Article 33, § 7-1(a). It is further conceded that the so-called "sore loser" provision, which keeps primary election losers off the general election ballot, does not apply to presidential elections.[4]

The stipulated facts relating to the standing of candidate Anderson in the national political polls and relating to his campaign efforts make it clear that the plaintiff is a non-frivolous candidate for the presidency with a chance of influencing the outcome of the election.

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[3] As indicated earlier, presidential candidates who are determined by the Secretary of State to be generally recognized as such in the media appear on the ballot without any action on their part. Instead, they are notified that they will appear on the ballot unless they file an affidavit by a set deadline stating that they are not candidates. Article 33, § 12-2(a), *supra*, note 1.

[4] Article 33, § 8-2(a) provides:

§ 8-2. NAME OF DEFEATED PRIMARY CANDIDATE NOT TO BE PRINTED ON GENERAL ELECTION BALLOT.

(a) No person who has been defeated for the nomination for any office in a primary election, except a candidate for the office of judge, and except as provided in subsection (b) below, shall have his name printed on the ballot at the succeeding general election as a candidate for any office. Nothing in this subsection shall be interpreted as being applicable to candidates for nomination of their party for President of the United States who have been defeated in a Presidential preference primary election.

The plaintiff's motion for summary judgment argues both that Maryland's requirements discriminate unconstitutionally against independent candidates, and that freedom of association is restricted unconstitutionally.

Federal courts in other states have struck down early filing deadlines upon challenges by plaintiff Anderson. In *Anderson* v. *Celebrezze*, No. C-2-80-400 (S.D. Ohio, July 21, 1980), the court found that a March 20 deadline affected fundamental rights and was not justified by any compelling state interest. Likewise, the court in *Anderson* v. *Hooper*, No. 80-432-M Civil (D.N.M., July 8, 1980), found that a March 4 deadline discriminated against Independent candidates. Both states had "sore loser" statutes, but, for different reasons, the statutes did not apply to Anderson under the circumstances.

II. BASIC EQUAL PROTECTION ANALYSIS

It has been held that the right to associate for political beliefs, and the right to cast one's vote effectively "rank among our most precious freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). It is clear that such rights are at stake in this case, since Maryland law prevents a candidate from appearing on the ballot, and prevents voters from effectively voting for that candidate.[5] It is also clear that Maryland treats Independents differently than it treats party candidates with respect to these rights. State law requires petitions with the requisite number of signatures for an Independent candidacy, while no petitions are required for a party nominee.

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[5] While the plaintiff could mount a write-in campaign, Article 33, §§ 4D-1 and 16-3(b)(3), it has been observed that "the realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974); *see also Williams* v. *Rhodes*, *supra*, at 437 (Douglas J., concurring).

Article 33, § 7-1. The law discriminates further with respect to presidential candidates in that an Independent seeking to be placed on Maryland's general election ballot must file his certificate of candidacy in early March, Article 33, §§ 7-1 and 4A-3, although in theory a party nominee could be placed on the ballot without having been a candidate at that time. Maryland law does not require the State Administrative Board of Election Laws to certify party nominees to the local boards until late August. Article 33, § 8-4. "Based upon past experiences, the names of the Democratic and Republican nominees are generally transmitted to the State Board a week after the respective National Conventions." Stipulation 40. Thus, a party candidate might not have to join the race until his party's convention, less than three months from the general election, while an Independent must do so eight months ahead. The defendants argue strongly that in the current primary system, as a practical matter, a party candidate must join the race at least a year in advance. While this has certainly been the general practice, it is not required by Maryland law, and it is the requirements of Maryland law which are before the Court at the present.

It has been stated by the Supreme Court that:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

Williams v. *Rhodes*, *supra*, at 31. Furthermore, even where there is a compelling state interest involved, it has been required "that States adopt the least drastic

means to achieve their ends." *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979). Accordingly, the Court will apply a two-part analysis to the restrictions involved here: First, is there a compelling state interest which justifies that kind of restriction? Second, is the restriction the least drastic means available to achieve that interest?

The defendants here, as the defendants in the Ohio case, argue that *Storer* v. *Brown*, 415 U.S. 724 (1974), and *Mandel* v. *Bradley*, 432 U.S. 173 (1977), have changed the law on equal protection analysis. The Court recognizes that language in both cases, taken out of context, creates some confusion. The Supreme Court in *Storer* made the following comments which might be interpreted as requiring a balancing test as the first step of the analysis:

> . . . the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," *Dunn* v. *Blumstein*, *supra*, at 348, very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams* v. *Rhodes*, *supra*, at 30; *Dunn* v. *Blumstein*, *supra*, at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance.

Storer v. *Brown*, *supra*, at 730. In remanding a case for further proceedings in *Mandel*, the Supreme Court

instructed the lower court to make the following inquiry, citing *Storer* as the source of the standard:

> [I]n the context of [Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. We note here that the State mentions only one instance of an independent candidate's qualifying . . . but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter.

Mandel v. *Bradley*, *supra*, at 177-178.

It is argued that these cases require as an initial inquiry by this Court a determination of whether a "reasonably diligent independent candidate" could satisfy the Maryland requirements. The Court rejects this contention. While the extent of the burden must be balanced against the state interest involved at a later point in the analysis, this is not the initial inquiry. Having determined that fundamental rights are being burdened, the first question is whether there is a compelling state interest which might justify these burdens. In other words, *Storer* and *Mandel* do not relieve the state of the burden of showing some compelling state interest which may justify the restrictions. Only after the Court is satisfied that such a compelling interest exists will it reach the issue of how drastic the restrictions are—that is, could a reasonably diligent candidate comply? To accept the defendants' argument would allow completely arbitrary restrictions on fundamental rights simply because the initial inquiry showed that a

"reasonably diligent candidate" could comply. That is clearly not the result intended by the Supreme Court. *See Anderson* v. *Celebrezze*, No. C-2-80-400 (S.D. Ohio, July 21, 1980) at 14-18.

III. EQUAL PROTECTION ANALYSIS APPLIED

Three compelling state interests have been suggested by the defendants, and by courts in other cases, which might justify the restrictions placed on Independent candidates seeking a place on the general election ballot in Maryland: 1) The interest in keeping frivolous candidates off the ballot. 2) the administrative interest in adequate time to verify petitions and print ballots. 3) The interest in the stability of the party system.

The interest of the state in keeping frivolous candidates off the ballot to keep the ballot to a manageable size has been recognized by the Supreme Court. *Lubin* v. *Panish*, 415 U.S. 709 (1974). The Court pointed out that procedures designed to further this interest may aid, rather than hinder effective voter choice:

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process.

Id. at 715. The Supreme Court suggested as one possible method of keeping frivolous candidates off the ballot "the precondition of demonstrating some reasonable quantum of voter support by requiring such parties [or candidates] to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election." *Id.* at 718. Thus it is clear that there is a compelling state interest which justifies some sort of petition re-

quirement. In this case, the plaintiffs challenge neither the existence of the requirement, nor the number of signatures required.[6]

The administrative interest ("the need for sufficient time to resolve any challenges to the nomination papers and to prepare ballots in a deliberate and orderly fashion") has also been recognized by the courts. *Salera* v. *Tucker*, 399 F. Supp. 1258, 1267 (E. D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976); *see also Anderson* v. *Celebrezze*, *supra*, at 18-19. This interest is not at issue, however. The plaintiffs do not challenge the legitimacy of this interest. While this interest does justify some filing deadline, it could not justify the March 3 deadline for Independent candidates. The printing of ballots could not begin until late August in any case, since the Democratic nominee will not be known before then.[7] Nor does verification of signatures on the petitions require that much time. In fact, Maryland law requires that local boards deliver the verified petitions to the State Administrative Board of Election Laws by twenty-one days after the deadline. Article 33, § 7-1(j). Even if it required the full twenty-one days to verify the two-thirds of the signatures due on the final deadline, there would be justification at best for a preliminary deadline for the first third approximately ten or eleven days earlier. In addition to verification by the local boards, there is the requirement that the state board tally the signatures to determine whether a sufficient number were filed.

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[6] A challenge to the number of signatures required would have little merit, since Maryland law requires 3% of the registered voters, while a requirement of 5% of the total votes cast in the last general election has been upheld. *Storer* v. *Brown*, *supra*, at 738-740.

[7] In a non-presidential election year, the printing could not begin until even later, since the primary election is in September in such years. Article 33, § 5-2.

Article 33, § 7-1(k). This process generally takes no more than five days. Stipulation 36(G). Thus it is clear that administrative concerns alone would not justify a deadline any earlier than this year's final deadline of August 4 (although the Court does *not* decide whether administrative needs justify a deadline even that early). Accordingly, unless there is some other state interest justifying the early deadline, Anderson must be allowed to appear on the general election ballot in Maryland, if the petitions submitted before August 4 otherwise meet state law requirements.

The other interest advanced by the state is its interest in the stability of the party system. This interest is related to the interest in keeping frivolous candidates off of the general election ballot, in that the party system is one way to narrow the field of candidates. The Supreme Court recognized the legitimacy of this interest in *Storer* v. *Brown*, *supra*, at 735, where one of the California provisions upheld by the Court was a requirement that an Independent candidate not be affiliated with a political party within the twelve months preceding the filing of his candidacy. This disaffiliation provision had the effect of a "sore loser" provision in that a defeated primary candidate would obviously not be eligible to run as an Independent; in many respects, the California provision was more restrictive than the typical "sore loser" statute, since it required such an early declaration of Independent status. In upholding the law, the Court commented:

> The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the

> losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

Id. While this language was in reference to a disaffiliation provision, it would also appear to support the narrower "sore loser" provision employed by some states.

Maryland has neither a pure disaffiliation statute, nor a pure "sore loser" provision which would apply here. The March 3 deadline for Independents has the effect of a "sore loser" provision, however, in that any candidate, such as plaintiff Anderson, who goes into the primary campaign to seek his party's nomination, will be ineligible to run as an Independent by virtue of missing the deadline. The defendants argue that the Constitution does not require that they employ either the typical disaffiliation provision or the typical "sore loser" provision in furthering the state interest in a stable party system. While this statement of the law may be accurate, it adds little to the defendants' argument since they justify the state statutes involved because they have the effect of a "sore loser" provision. Specifically, the defendants argue that Article 33, §§ 4A-3 and 7-1(b)(1), "prevent a defeated Presidential candidate for party nomination, like Plaintiff Anderson, from disavowing his party candidacy when it falters, disrupting the political process and causing strife within his party by attempting another candidacy as an 'independent.'" Defendants' Brief at 46. This is exactly the effect of a "sore loser" provision; notwithstanding their disclaimers, the defendants are in essence asking the Court to uphold the Maryland laws because they have that effect.

The Court declines to do so. It would be a different case if Maryland had a "sore loser" provision which

explicitly applied to Presidential primary losers seeking to run as Independents.[8] It does not. In fact, the state's "sore loser" provision explicitly excludes presidential primaries.[9] Article 33, § 8-2(a). It is only the early deadline which produces this result. The Court is not convinced that a purpose of this deadline was to bring about the same result as a "sore loser" provision. The early deadline has a much broader effect than that. It prohibits *all* Independent candidacies where no certificate was filed by March 3, regardless of the candidate's participation or non-participation in a party primary. Because of this broad coverage, the Court cannot accept the defendants' argument that the statute should be evaluated on the basis that its effect is to keep a defeated primary candidate off of the general election ballot.

In the Ohio case the court rejected the defendants' contention that the effect of the early deadline was the same as a disaffiliation provision, and that the statute should be upheld on that basis. The court found that the law in question "acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." *Anderson* v. *Celebrezze*, *supra*, at 21. This Court also finds that the challenged statute produces the effect relied upon by the defendants only by "happenstance", and not by any "reasonably discernible legislative design."

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[8] The Court does not decide now whether there would or would not be any constitutional problems with such a provision, since that question is not before the Court.

[9] It is not clear from the language of the statute, however, whether the exclusion was intended to address situations such as that of plaintiff Anderson, or whether it was only intended to address the far more common problem of a presidential candidate losing the Maryland primary, but going on to receive his party's nomination. Without removing presidential races from the operation of the "sore loser" law, such a candidate could not appear on the general election ballot in Maryland.

Accordingly, the issue now before the Court is whether the early deadline of March 3 for Independents to file their certificates of candidacy for the presidency is justified by any compelling state interest. The Court limits its consideration to the deadline as it applies to presidential candidates, since there is a clear difference in treatment of Independents and party candidates for president not present elsewhere: although an Independent must file his candidacy by March 3, a party nominee could in theory appear on the general election ballot without having declared his candidacy before the time of the party convention. The Court does not reach the issue of the deadline as it applies in state and local races.

Nor does the Court consider the issue of the number of signatures which must be filed by the early deadline. If the early deadline is unconstitutional, obviously no signatures may be required at that point. If on the other hand the Court were to uphold the deadline, Anderson would be ineligible to run for failure to meet the filing deadline, and there would be no reason to consider the petition requirement. The sole issue to be considered is whether the early deadline itself, as applied to Independents running for president in Maryland, is justified by any compelling state interest. The Court finds it is not.

The defendants suggest that the current law has received implicit approval from the courts because it was drawn up in response to *Mandel* v. *Bradley*, 432 U.S. 173 (1977), *on remand*, *Bradley* v. *Mandel*, 449 F. Supp. 983 (D.Md. 1978). That case arose out of an Independent candidacy for United States Senate in 1976. At that time, Maryland law did not provide for a two-stage submission of petitions, as it does now, but required *all* signatures (three percent of the registered voters) to be submitted by the early deadline (March in presidential primary years). 51,155 signatures were required, but

of the 53,239 which were timely filed by the candidate, only 42,049 were determined to be valid. Bradley filed suit in this Court challenging the early deadline for filing of petitions.

A three-judge court ruled in Bradley's favor. *Bradley* v. *Mandel*, Civ. No. T-76-638 (D.Md., May 17, 1976). In so ruling, the court relied heavily on *Salera* v. *Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). *Salera* involved a challenge to a Pennsylvania statute requiring that all signatures be gathered in a three-week period ending over two hundred days before the general election. The district court found no state interest sufficiently compelling to justify the early petition filing deadline; the Supreme Court summarily affirmed. The Maryland district court also concluded that the early termination date of the signature gathering period substantially burdened the ability of Bradley to get on the ballot, but did so without any detailed factual inquiry. *Bradley* v. *Maryland*, *supra*, at 7. The court relied on *Salera* for the proposition that the remoteness of the cut-off date alone constituted an impermissible burden on the plaintiff, rejecting the defendants' contention that the district court and the Supreme Court in *Salera* had also considered the shortness of the three-week signature-gathering period.

The Supreme Court remanded the *Bradley* case to the district court for further proceedings, holding that the district court had misinterpreted the summary affirmance in *Salera*. The Court stated that the *Salera* case was distinguishable because of the twenty-one day period, which "enormously increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate." *Mandel* v. *Bradley*, *supra*, 432 U.S. at 177. The Maryland district court, on the other hand, had made no finding as to whether there were substantial burdens on an independent candidate trying to

meet the petition deadline. The case was remanded for such a finding, with instructions to determine whether a "reasonably diligent independent candidate" could be expected to meet the deadline. *Id.* at 177.

On remand, the district court determined that the early deadline for filing petitions did in fact constitute an unconstitutional burden. It cited factors such as the adverse winter weather conditions before the deadline, the lack of media coverage at that early stage, and the fact that campaign issues had not developed much by that stage; all of these factors made it difficult for an Independent candidate to gather the necessary signatures so early. *Bradley* v. *Mandel*, *supra*, 449 F. Supp. at 986. The court drew similar conclusions upon examination of past experiences of Independent candidates. *Id.* at 987-988.

Both plaintiffs and defendants misread the *Bradley* opinions. The plaintiffs suggest that the *Bradley* court found the filing deadline itself to be unconstitutional. In fact, the court found that the early deadline for filing the signatures was unconstitutional; the court did not reach the issue of whether the filing deadline *per se* was unconstitutional. The defendants, on the other hand, conclude that the *Bradley* cases stand for the proposition that the filing deadline was not *per se* unconstitutional. They rely heavily on the fact that the Supreme Court remanded the case to determine whether the early petition deadline imposed substantial burdens on a "reasonably diligent independent candidate." The reason the Court did this, however, was that the district court had found that the early petition deadline *did* impose burdens without any detailed factual findings upon which to base the conclusion. The defendants argue that if the deadline itself was *per se* unconstitutional, there would have been no point in remanding. Such is not the case. Neither the district court nor the Supreme Court was faced with

the question of whether the early deadline by itself was unconstitutional. Bradley in fact had *met* the early deadline for filing his certificate of candidacy and therefore had no reason to complain about it. It was the early deadline for filing *petitions* which he complained of, and it is this requirement which the district court found violative of the Constitution. The courts did not reach the issue of the filing deadline itself, and thus, contrary to the assertions of the parties, the *Bradley* cases do not resolve the present dispute.[10]

There are cases which have dealt with the issue of the filing deadline alone. The New Mexico district court, in ruling in Anderson's favor found no compelling state interest which justified a March 4 deadline for Independents, while allowing parties to designate their candidates as late as September 15. *Anderson* v. *Hooper*, *supra*, at 11-13. Similarly, the Ohio district court found that the state had "demonstrated no interest served by the filing deadline other than its simple function as an arbitrary point in time by which independent candidates

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[10] The only language in any opinion which supports the contention by the defendants that the district court suggested and endorsed the current two-stage filing process is found in the original opinion before remand. There, the court in rejecting the state's argument that the early filing deadline for petitions and primary candidates treated all equally, stated that "quite readily, Maryland could require independent candidates to file a declaration of candidacy at the same time as partisan candidates and then extend the date for the submission of signatures to the date of the primary election." *Bradley* v. *Mandel*, Civ. No. T-76-638 (D.Md., May 17, 1976) at 11. This statement was merely a rejection of the state's argument that there *was* equal treatment. It does not constitute an endorsement of the present plan. Even if interpreted as a suggestion or endorsement, it is dictum at best. Finally, the court notes that this so-called "suggestion" does not include *any* signatures to be filed by the early deadline. While the early filing of signatures is not at issue in this case, the discrepancy does weaken the defendants' argument of court endorsement of the present law.

must officially throw their hats into the political ring." *Anderson* v. *Celebrezze, supra,* at 22.

Most of the previous opinions relied upon by parties are based on somewhat different facts. Perhaps most on the point is *MacBride* v. *Exon,* 558 F.2d 443 (8th Cir. 1977). That case involved a challenge to a Nebraska law which allowed no Independent candidates on the ballot. A candidate other than a major party candidate could get on the ballot only by being the candidate of a third-party; third parties were required to meet certain qualifications in advance of the primary election. The court ruled it unconstitutional to have no procedure by which a candidate other than a major party candidate could receive a place on the ballot after the primary. *Id.* at 449. Most of the other cases cited by the plaintiffs are distinguishable, since filing deadlines were struck down only in conjunction with other requirements, such as filing of petitions. As indicated earlier, the only issue before this Court is whether the filing deadline by itself is unconstitutional.

There is one case cited by the defendants which suggests that filing deadlines for Independent candidates before the primary election may be justified. *Socialist Labor Party* v. *Rhodes,* 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd. sub nom. Sweetenham* v. *Gilligan,* 409 U.S. 942 (1972). In reaching the conclusion that Independent candidates for Congress and Governor could be required to file before the primary the court commented that "one may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process." *Id.* at 1273. Even if this is a compelling state interest (and this Court does not so rule in this case), it would not justify a deadline for Independent candidates for President months before the party conventions, since party nominees for President are not chosen until then.

The state has suggested no compelling state interest which would justify the March 3 filing deadline for Independent candidates for President. While administrative needs obviously justify some deadline, this interest does not justify such an early deadline. Therefore, the Court finds that the early deadline for filing a certificate of candidacy imposed on Independent candidates for President by Ann. Code of Maryland, Article 33, §§ 7-1 and 4A-3, is unconstitutional in that it requires Independent candidates to file their candidacies months before the parties designate their nominees, and no compelling state interest has been shown to justify this additional burden on Independent candidates. Because the early deadline for filing the certificate of candidacy is unconstitutional, the early deadline for filing a portion of the petitions must also fall. The Court need not determine the earliest deadline which could be justified by compelling state interests. It does find, however, that no interests have been shown which would justify a deadline for filing the certificate of candidacy or the petitions earlier than August 4, the date currently set by law as the final petition deadline.

In so ruling, the Court emphasizes that it does not rule one way or the other on the constitutionality of "sore loser" provisions as they apply to presidential candidates. Nor does it reach the issue of the constitutionality of Maryland's early deadline for Independent candidates for other offices to file their certificates of candidacy.

Accordingly, it is this 6th day of August, 1980, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendants place plaintiff Anderson on the general election ballot as an Independent candidate for President of the United States if the petitions filed by

his campaign on or before August 4, 1980, otherwise meet the requirements of Maryland law; and

2. That a copy of this opinion be sent to counsel for the parties.

/s/ [Illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-80-1632

JOHN B. ANDERSON; D. A. BERT BOOTH;
KEVIN P. MCCLEAF; GERALD M. EISENSTAT

v.

WILLIARD A. MORRIS in his official capacity as State Administrator of the Election Laws, State Administrative Board of Election Laws; THEODORE N. CLARK in his official capacity as Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON in his official capacity as Vice-Chairman of the State Administrative Board of Election Laws; REGINALD A. ASPLEN in his official capacity as a member of the State Board of Election Laws; KAREN LANCASTER in her official capacity as a member of the State Administrative Board of Election Laws; SYLVIA RAPHAEL in her official capacity as a member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

JUDGMENT

In accordance with the Memorandum Opinion and Order of the Honorable Joseph H. Young filed August 6, 1980 in the above entitled case, it is

ORDERED AND ADJUDGED:

That the defendants place plaintiff John B. Anderson on the general election ballot as an Independent candidate for President of the United States if the petitions filed by his campaign on or before August 4, 1980 otherwise meet the requirements of Maryland law.

Dated at Baltimore, Maryland this 6th day of August, 1980.

PAUL R. SCHLITZ, Clerk

By: /s/ R. Bruce McElhone
R. BRUCE MCELHONE
Deputy Clerk

APPROVED this 6th day of August, 1980.

/s/ Joseph H. Young
JOSEPH H. YOUNG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-432-M Civil

JOHN B. ANDERSON, JANE EVANS, and
GERALD M. EISENSTAT,
Plaintiffs,

v.

SHIRLEY HOOPER, Secretary of State of the
State of New Mexico,
Defendant.

MEMORANDUM OPINION AND ORDER

This action for declaratory and injunctive relief was filed by the plaintiffs in this case on June 10, 1980. In their Complaint, the plaintiffs claim that the defendant has denied them the rights guaranteed under the due process and equal protection clauses of the Fourteenth Amendment. The plaintiffs have applied for a preliminary injunction in this matter. The defendant has moved to dismiss this suit because of a lack of subject matter jurisdiction and a failure by plaintiffs to state a claim upon which relief can be granted. A hearing on both issues was held on June 27, 1980.

The relevant facts involved in this case are not in dispute. Counsel for the plaintiffs and for the defendant entered into a joint stipulation of facts which was filed in this court on June 26, 1980. The plaintiff, John B. Anderson, is seeking to run as an independent candidate for President of the United States in the 1980 General Election. Plaintiff, Jane Evans, a registered New Mexico voter, wishes to cast her vote in the 1980

General Election for John B. Anderson. Plaintiff, Gerald M. Eisenstat, a registered New Jersey voter, intends to cast his vote in the 1980 General Election for electors pledged to Anderson. Plaintiff Anderson declared his intention to seek the nomination of the Republican Party for President of the United States on June 8, 1979. On February 15, 1980, a committee, pursuant to N.M. Stat. Ann. § 1-8-56 (1978), nominated and certified to the defendant Shirley Hooper, the New Mexico Secretary of State, the name of John B. Anderson as a candidate for the Republican Party in the New Mexico primary election for the office of President of the United States. On February 19, 1980, the defendant notified Mr. Anderson that his name would be placed on the Presidential Primary Election ballot unless he notified her otherwise, in writing, no later than Monday, April 14, 1980, which was the last day a candidate could withdraw from the primary election.

On April 24, 1980, Mr. Anderson notified the defendant that he had withdrawn as a candidate for the Republican presidential nomination, that he intended to seek the presidency as an independent candidate and that his name should be removed from the ballot of the 1980 New Mexico Presidential Primary Election. The defendant subsequently informed Mr. Anderson that his name could not be removed from the ballot because the request for such removal had not been made prior to the April 14 deadline. On June 3, 1980, the primary election was held in New Mexico. The name of John B. Anderson appeared on every Republican ballot in that election.

Mr. Anderson's supporters began obtaining the nominating petition signatures for his candidacy as an Independent on May 19, 1980. By June 3, 1980, Mr. Anderson was ready, willing and able to present to the defendant a declaration of candidacy, a full slate of electors for the presidency and the nominating petitions he had collected. Because of a March 4, 1980 deadline, the defend-

ant would not have accepted these documents if they had been tendered on June 3, 1980.

The plaintiffs' complaint contains three counts. In their first count the plaintiffs claim that the New Mexico filing date applicable to Independent presidential candidates violates the equal protection clause of the Fourteenth Amendment in that it creates an arbitrary distinction between partisan and independent candidates. They also claim it creates another arbitrary distinction between independent candidates for the office of President who decide upon their candidacy prior to March 4, 1980 and those who decide on their independent candidacies after March 4, 1980. The plaintiffs' second count alleges that N.M. Stat. Ann. § 1-8-52 (1978) deprives the plaintiffs of an opportunity to associate for the advancement of political beliefs in derogation of rights secured to them by the First and Fourteenth Amendments of the United States Constitution. The plaintiffs' third count alleges that N.M. Stat. Ann. § 1-8-52 (1978) violates the Supremacy Clause of the United States Constitution in that it is inconsistent with and frustrates the operation of federal laws governing the conduct of presidential elections.

The plaintiffs have requested that this court preliminarily and permanently enjoin the defendant from refusing to accept plaintiff Anderson's declaration of candidacy and nominating petitions and from refusing to certify plaintiff Anderson as an independent candidate for the office of President on the ballot in the November, 1980 New Mexico General Election. They further request a declaration that N.M. Stat. Ann. § 1-8-52 (1978) is invalid because it violates the Supremacy Clause and the First and Fourteenth Amendments to the Constitution of the United States. Although plaintiffs' application for a preliminary injunction was filed prior to the defendant's motion to dismiss, I feel it is appropriate to address the

motion to dismiss first because a decision on that motion may preclude the necessity of addressing plaintiffs' application for a preliminary injunction.

The defendant's motion claims that dismissal of this action is necessary because no case or controversy as required by Article III of the United States Constitution exists and that plaintiff has failed to state a claim upon which relief can be granted. The defendant claims that because plaintiff Anderson has not tendered, nor attempted to tender, his declaration of candidacy and petitions to the defendant, he has failed to present this court with a concrete case or controversy. The joint stipulation of fact filed in this case states that the defendant "would not have accepted plaintiff Anderson's declaration of candidacy, his nominating petitions or his designation of electors for the purpose of including his name as an independent candidate for President on the ballot for the general election, had they been tendered on June 3, 1980." Joint Stipulation of Fact ¶ 40 at 12 (filed June 26, 1980). The defendant claims that the above-quoted stipulation does nothing to reduce the hypothetical nature of this case and that, therefore, the issues presented by the plaintiffs are not yet ripe for judicial decision.

While it is clear that the federal courts cannot constitutionally hear abstract or hypothetical questions, the difference between a hypothetical or abstract question and a "case or controversy" is one of degree. The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), *citing Railway Mail Association* v. *Corsi*, 327 U.S. 88, 93 (1945). In order to challenge the statute at issue in this case, the plaintiffs must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's

operation or enforcement. *Cf. O'Shea* v. *Littleton*, 414 U.S 488, 494 (1974). It is clear from the joint stipulation of fact that the plaintiffs in this case have a realistic danger of sustaining injury as a result of the statute in question. Pursuant to N.M. Stat. Ann. § 1-8-64 (Supp. 1979) the defendant, the Secretary of State, shall refuse to accept any petitions not complying with N.M. Stat. Ann. §§ 1-8-1 to 63 (1978). It is undisputed that plaintiff Anderson failed to submit his petitions for his independent candidacy by the first Tuesday of March as required under N.M. Stat. Ann. § 1-8-52 (1978). The Secretary of State cannot, therefore, accept those petitions. This inability is even more evident by the fact that in the Election Code it is clear that "shall" is mandatory. N.M. Stat. Ann. § 1-1-3 (1978). The Secretary of State has no choice but to refuse to accept Anderson's petitions. This refusal will mean that plaintiff Anderson will be unable to run as an independent presidential candidate in the General Election in New Mexico. This will undoubtedly cause injury to his national campaign for the presidency of the United States and will adversely affect the rights of the other plaintiffs in this action. It should not be necessary for the plaintiffs to await the consumation of the threatened injury to obtain preventive relief. Impending injury is enough particularly when such injury is certain. *Cf. Babbitt* v. *United Farm Workers Nat'l Union*, at 298. A real and substantial controversy admitting of specific relief as distinguished from an advisory opinion upon a hypothetical state of facts exists here. *Cf. Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937).

The finding of an actual case or controversy in the present suit is further supported by the Supreme Court's affirming two cases attacking petition requirements under Illinois election statutes. In both of those cases the courts addressed the substantive issues even though questions of judiciability or ripeness had been raised. These cases

were commenced prior to the plaintiffs filing any petitions. *Socialist Workers Party* v. *Chicago Board of Elections*, 433 F.Supp. 11, 14 (N.D.Ill. 1977), aff'd 566 F.2d 586 (7th Cir. 1978), aff'd *sub nom. Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979); *Jackson* v. *Ogilvie*, 325 F.Supp. 864, 866 (N.D. Ill.), aff'd 403 U.S. 925 (1971). If a potential candidate is able to complain of petition requirements before a deadline for petitions has arrived, surely the issues are ripe for attack on the validity of deadlines after a deadline has passed. The defendants' motion to dismiss for failure to present a case or controversy will, therefore, be denied.

The defendant also moved this Court to dismiss this action because the plaintiffs had failed to state a claim upon which relief may be granted. The defendant argues that even if this Court were to find N. M. Stat. Ann. § 1-8-52 (1978) unconstitutional other New Mexico statutes would prevent the placing of plaintiff Anderson's name on the 1980 general election ballot. The defendant claims that N.M. Stat. Ann. §§1-8-19 and 1-10-7 (1978) are applicable to plaintiff Anderson, who ran in the Republican Presidential primary, and, therefore, his name cannot appear on the 1980 general election ballot. Section 1-8-19, which was enacted in 1975 as part of the Primary Election Law, provides:

> If a person has been a candidate for the nomination of a major political party in the primary election, he shall not have his name printed on the ballot at the next succeeding general election under any party name or party emblem except the party name on his declaration of candidacy filed for such primary election.

Section 1-10-7, which was enacted in 1977 and amended in 1979, provides:

> Except in the case of a candidate for the United States senate or United States representative who is also a candidate for president or vice president of the United States, no candidate's name shall appear more than once on the ballot. Whenever a person is, with his knowledge and consent, a candidate at any nominating convention or primary for nomination as the candidate of any political party for any office to be voted on at the election to be held next after such convention or primary, his name shall not be printed on the ballot at such election in the column under the party name and emblem of any other party.

The defendant argues that because plaintiff Anderson ran in the Republican presidential primary he is ineligible to run as an independent in the general election. The plaintiffs maintain that these two statutes are not applicable to Anderson because (1) they apply only to candidates for statewide, county, or legislative office; (2) Anderson would not appear on the general election ballot under any party name or emblem; and (3) Anderson was not a candidate in New Mexico's June 3 presidential primary.[1]

It is clear that these two statutes, commonly referred to as the "sore loser" statutes during this litigation, were enacted to prevent unsuccessful candidates in primary elections from running again in the next succeeding general election. It is not necessary that I address the issue of whether these two statutes are within the valid exer-

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[1] This third basis raised in support of the inapplicability of the two statutes to Anderson is spurious. The plaintiffs argue that because Anderson withdrew his consent to be a candidate in the Republican primary before the primary was actually held he was not a legitimate candidate in the primary pursuant to N.M. Stat. Ann. § 1-10-7 (Supp. 1979). Anderson failed to timely withdraw from the Republican primary so he was a legitimate candidate in the Republican primary.

cise of a legitimate state interest in the proper management of its ballots because I find the statutes to be inapplicable to plaintiff Anderson. Section 1-8-19 is a part of the Primary Election Law (N.M.Stat.Ann. §§ 1-8-10 to 52 (1978)). The Primary Election Law applies to "major party nominations for all offices that are to be filed at the general election with the exception of presidential electors." N.M.Stat.Ann. § 1-8-17 (1978). Under that limitation the presidential primary held in New Mexico on June 3, 1980 does not fit within the purview of the Primary Election Law. The presidential primary merely gives voters the opportunity to express their preference for the person to be the presidential candidate of their party, N.M.Stat.Ann. § 1-8-54 (1978), and as such is regulated in New Mexico by the Presidential Primary Act, N.M.Stat.Ann. §§ 1-8-53 to 63 (1978). The Presidential Primary Act was passed in 1977 by the Legislature and neither contains its own "sore loser" provision nor incorporates the provisions found elsewhere in the Election Code. The only connection apparent in the statutes between the presidential primary election and the primary elections is that they are held on the same date. N.M.Stat.Ann. § 1-8-54 (1978). Plaintiff Anderson was a candidate in the Republican *presidential primary* but not in the Republican *primary*. Sections 1-8-19 and 1-10-7 are inapplicable to plaintiff Anderson and, therefore, do not prevent the placing of his name on the general election ballot.

Even if sections 1-8-19 and 1-10-7 applied to presidential primaries they would not prevent plaintiff Anderson's name from appearing on the general election ballot as an independent. Those two statutes only prevent unsuccessful primary candidates from appearing on the next general election ballot under any party name or party emblem different from that he ran under in the primary. Plaintiff Anderson seeks to run as an independent candidate and as such would be "a candidate without party affiliation for an office to be voted on at a general elec-

tion . . .." N.M. Stat. Ann. § 1-8-45 (1978). In order to have a party name or emblem the chairman of the state central committee of a qualified political party has to file with the Secretary of State a certificate setting forth the name and showing a representation of the emblem. N.M. Stat. Ann. § 1-7-6 (1978). To qualify as a political party, rules and regulations must be filed with the Secretary of State. N.M. Stat. Ann. § 1-7-2 (Supp. 1979). It is difficult to understand how one could be, by definition, "without party affiliation" and at the same time be running for an office under a party name or party emblem.

Defendant argues that § 1-8-19 was enacted prior to New Mexico's election laws allowing for independent candidacies and should be construed to prevent unsuccessful primary candidates from running as independents in the succeeding general election. It is true that § 1-8-19 was enacted in 1975 and the statutory provisions for independent candidates were not enacted until 1977. Section 1-10-7, however, was passed in the same legislative session as the independent candidate provisions and was amended in 1979. It still refers to party names and emblems although the legislature was clearly aware that independent candidates could exist. Under those circumstances I cannot find that the legislature intended anything other than to prevent *party* switching after an unsuccessful primary bid in order to run in the general election.

Sections 1-8-19 and 1-10-7 do not prevent an unsuccessful party primary candidate from running as an independent in the succeeding general election. Plaintiffs have not failed to state a claim upon which relief can be granted. Defendant's motion to dismiss on those grounds shall be denied. It is therefore necessary to address plaintiffs' application for a preliminary injunction. They have requested this Court to enjoin the defendant from continuing to refuse to accept plaintiff

Anderson's declaration of candidacy, nominating petitions, and designation of electors for the purpose of qualifying Anderson to appear on the ballot in New Mexico's general election as an independent candidate for president.

In order to be entitled to any preliminary injunction in this matter, the plaintiffs must show that they have a substantial likelihood of success on the merits and that if a preliminary injunction is not granted they will suffer irreparable injury. Plaintiffs challenge the constitutionality of N.M. Stat. Ann. § 1-8-52 (1978) on two related bases. First, the plaintiffs claim that the early filing deadline impermissibly burdens their constitutional rights. The rights which the plaintiffs claim are burdened are the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights have been deemed to be fundamental rights by the United States Supreme Court. *Illinois State Bd. of Elections* v. *Socialists Workers Party*, 440 U.S. 173, 185 (1978). The plaintiffs allege that to require an independent candidate to decide to run and to complete the necessary formalities by March 4, 1980 interferes with their rights of association and effective voting.

Secondly, the plaintiffs assert that the early filing deadline applicable only to those wishing to run as an independent candidate in the general election denies plaintiff Anderson the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. The New Mexico Election Code sets up different filing deadlines for different types of candidates. Independent candidates for president must file their declarations of candidacy and nominating petitions by March 4, 1980. The major and minor parties do not need to designate their nominees for president until September

15, 1980. Plaintiffs claim that this six-month difference as to when presidential candidates must be named results in an arbitrary and invidious discrimination against independent presidential candidates, as distinguished from partisan candidates.[2]

The importance of the plaintiffs' interests which are at stake is undeniable. The right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively both rank among this country's most precious freedoms. *Williams* v. *Rhodes*, 393 U.S. 23 (1968). When ballot access is restricted by statutory requirements, as it is in this case by the March 4 deadline, the State must show a compelling interest which is furthered by its requirements. *Cf. Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. at 184.

There are a number of interests that states have historically proffered as reasons for limiting access to the ballot. The defendant in this case has not offered any reason which could justify a March filing date for an independent presidential candidate and a September deadline for the naming of partisan presidential candidates. Certainly the State of New Mexico can further its interests in limiting ballot access by having deadlines. Such deadlines, however, should be uniform for candidates for the same office. The State does have an interest in keeping its ballots manageable, in protecting the integrity of the political process from frivolous candidates and in the stability of the political system. These interests are not furthered by having an extraordinarily early deadline for presidential independent candidates.

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[2] Plaintiff also argues that the deadline also creates an invidious classification between serious independent candidates deciding to run before March 4, 1980 and those deciding to run after March 4, 1980. Because of my determination on the equal protection based on an arbitrary classification between independent and partisan candidates, I decline to address that issue at this time.

Under the facts in this case, I cannot find that any state interest is furthered by the March 4 deadline for independents. The burden placed on the plaintiffs' fundamental rights and the classification between partisan and independent presidential candidates can be allowed only if the State has a compelling interest at stake. The defendant has failed to offer any compelling interests which the State may further in having such an early filing deadline for independent candidates for president. Under the circumstances, I find that the plaintiff has a substantial likelihood of success on the merits in this case.

Inquiry must next be made as to whether or not the plaintiffs will sustain irreparable injury if a preliminary injunction is not issued during the pendency of this litigation. I find that such injury would occur if I failed to issue a preliminary injunction. The general election will occur in a few months. If plaintiff Anderson's name does not appear on the general election ballot there would be no adequate remedy at law to compensate him for this injury should he prevail in the final judgment. Furthermore, the rights of the other plaintiffs in this action of being able to cast their votes effectively for the candidate of their choice would be irreparably harmed. The irreparable injury which will occur to the plaintiffs if a preliminary injunction is not issued is not outweighed by any possibility of harm to the defendant or by any public interest. The defendant has argued that the State of New Mexico will be harmed if she is unable to enforce the filing deadlines. There has been no indication that the defendant will be inundated with declarations of candidacy and petitions from other potential independent candidates if she is not allowed to enforce the March 4, 1980 filing deadline for independent candidates for the general election. If the ballots were already printed and an election was imminent equitable considerations might justify this Court withholding immediate

relief. Here, however, the defendant has sufficient time and resources to put Mr. Anderson's name on the ballot. Given the clear unconstitutionality of N.M. Stat. Ann. § 1-8-52 (1978) on its face and as applied to Mr. Anderson, denying a preliminary injunction would be inequitable. The defendant shall be preliminarily enjoined from continuing to refuse to accept plaintiff Anderson's declaration of candidacy and nominating petitions and from refusing to certify plaintiff Anderson as an independent candidate for the office of president on the ballot in the November, 1980 New Mexico General election. Now, Therefore,

IT IS ORDERED that defendant's motion to dismiss be, and hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's application for preliminary injunction be, and hereby is, granted.

/s/ [Illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-432-M Civil

JOHN B. ANDERSON, JANE EVANS, and
GERALD M. EISENSTAT,
Plaintiffs,

v.

SHIRLEY HOOPER, Secretary of State
of the State of New Mexico,
Defendant.

PRELIMINARY INJUNCTION

Plaintiffs in this action having filed a motion for a Preliminary Injunction and having, on June 27, 1980, heard testimony and taken evidence and being otherwise fully advised in the premises, I find that the motion is well taken for the reasons stated in my Memorandum Opinion and Order entered this date. Now, Therefore,

IT IS ORDERED that defendant Shirley Hooper is hereby enjoined from refusing to accept plaintiff Anderson's declaration of candidacy and nominating petitions as an independent candidate for the presidency of the United States in the 1980 General Election. Assuming the audit of the petitions indicate the signature requirements for nomination have been met, defendant Shirley Hooper shall refrain from refusing to certify plaintiff Anderson as an independent presidential candidate in that election during the pendency of this action.

/s/ [Illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-432-M Civil

JOHN B. ANDERSON, JANE EVANS, and
GERALD M. EISENSTAT,
Plaintiffs,

v.

SHIRLEY HOOPER, Secretary of State
of the State of New Mexico,
Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes up for consideration on cross motions for summary judgment filed by the plaintiffs and the defendant in this matter. The plaintiffs have also requested this court to make the preliminary injunction previously entered in this case a permanent injunction. Having considered the motions as well as the briefs filed by counsel and the supplemental joint stipulation of fact filed by the parties, I find that plaintiffs' motion for summary judgment is well taken in part.

The preliminary injunction previously granted in this matter enjoined the defendant from refusing to accept plaintiff Anderson's declaration of candidacy and nominating petitions during the pendency of the litigation. When granting the preliminary injunction I stated that the importance of the rights and interests asserted by plaintiffs in this action mandated that the State show a compelling interest furthered by its deadline requirements in order for the statute in question to be constitutional under the First and Fourteenth Amendments of the United States Constitution. The defendant in this case has failed to sustain this burden of showing such a com-

pelling interest. Partial summary judgment in favor of the plaintiffs as to Counts I and II is, therefore, appropriate in this case. Summary judgment in favor of the plaintiffs is entered only on the allegations that the statute impermissively burdens fundamental rights and denies plaintiff Anderson the equal protection of the laws of the United States. The determination that this statute denies plaintiff Anderson the equal protection guaranteed by the Fourteenth Amendment is based on a finding that the statute invidiously discriminates against independent presidential candidates as distinguished from partisan candidates. I decline to address plaintiffs' allegation that the deadline also creates an invidious classification between serious independent candidates deciding to run before March 4, 1980 and those deciding to run after March 4, 1980.

Plaintiffs have failed to show that the early deadline statute violates the Supremacy Clause of the United States Constitution. Summary judgment in favor of defendant is, therefore, appropriate as to Count III of the Complaint.

Defendant's motion for summary judgment also included a request that this court set a deadline for independent candidates seeking access to the 1980 General Election Ballot. This request was made because the New Mexico Legislature will not meet again until 1981 and the defendant is in need of an interim deadline which she can use to control the timing for filing nominating papers by independent candidates in the 1980 general election. Defendant has requested the date of August 15, 1980 as the filing deadline for independents in the 1980 general election. While I feel that the reasons for requesting August 15 put forth by the defendant are appropriate I feel compelled to give adequate notice to potential independent candidates so that they may have sufficient time to file their declaration of independent can-

didacy and gather the signatures for their nominating petitions. I shall, therefore, set August 20, 1980 as the deadline for potential independent candidates to submit the appropriate papers to the Secretary of State of New Mexico to achieve ballot position for the 1980 General Election.

Plaintiffs also requested that this Court enter a permanent injunction in this case. Because of my determination on the summary judgment motions I find that a permanent injunction should be entered.

Plaintiffs have also requested that I grant them their costs and reasonable attorneys' fees which were incurred in bringing this action. I shall postpone a decision on this request until such time as the defendant Shirley Hooper has a reasonable amount of time to respond to the plaintiffs' request. Now, Therefore,

IT IS ORDERED that plaintiffs' motion for summary judgment shall be granted as to Counts I and II of their complaint filed in this action on June 10, 1980 and shall be denied as to Count III of that complaint.

IT IS FURTHER ORDERED that defendant's motion for summary judgment shall be denied as to Counts I and II of the complaint filed in this action and shall be granted as to Count III of the complaint.

IT IS FURTHER ORDERED that the date of August 20, 1980 shall serve as the final filing date for the appropriate papers for all those wishing to appear as independent candidates on the ballot for the 1980 General Election.

IT IS FURTHER ORDERED that the preliminary injunction entered in this matter on July 8, 1980 shall be made permanent.

IT IS FURTHER ORDERED that a decision on plaintiffs' request for attorneys' fees and costs to be awarded

against defendants shall be deferred until such time as defendants have had an adequate opportunity to respond to that request.

/s/ [Illegible]
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 80-17

PERCY L. GREAVES, ET AL.,
Plaintiffs,

vs.

FRANCES JONES MILLS, ET AL.,
Defendants.

Civil Action No. 80-18

JOHN B. ANDERSON, ET AL.,
Plaintiffs,

vs.

FRANCES JONES MILLS, ET AL.,
Defendants.

MEMORANDUM OPINION

In Civil Action No. 80-18 (hereinafter "Anderson case"), plaintiff, John B. Anderson, a citizen and Congressman from Illinois, is an independent presidential candidate seeking to be placed on the ballot in the November general election in Kentucky. Other plaintiffs are Joseph C. Greaves, Jr., a citizen of Kentucky, and a person who is pledged to be an elector for Congressman Anderson in his presidential race; and Gerald M. Eisenstadt, a citizen of New Jersey, and a supporter of Anderson for President.

In Civil Action 80-17 (hereinafter "Greaves case"), plaintiff Percy L. Greaves is a citizen of New York and is also an independent presidential candidate, seeking to be placed on the ballot in November. Other plaintiffs

are Dr. Wasley Krogdahl, Margaret Krogdahl, and Robert Vessels, all citizens of Kentucky, and supporters of Greaves for President. Dr. Krogdahl also seeks to have his name placed as an elector for plaintiff Greaves for President.

The defendants in both cases are Frances Jones Mills, the Secretary of State, and members of the State Board of Elections. In addition, in Civil Action No. 80-17, Brady A. Miracle, the Executive Director of the Board of Elections, is a party defendant. The responsibility of Mrs. Mills and the Board of Elections is to administer elections in Kentucky, and to issue certificates of election for successful candidates. KRS Chapters 117-118. Petitions and certificates for nomination for electors of President and Vice President of the United States are to be filed with the Secretary of State. KRS 118.365 (4).

The two cases have been consolidated pursuant to Rule 42(A), Federal Rules of Civil Procedure, and have come before the Court on cross motions for summary judgment. The Court commends the parties for their diligence in getting the record ready for a decision, especially in their stipulation in the facts. As there does not appear to be any genuine issue of material fact, this is an appropriate case for summary judgment under Rule 56, Federal Rules of Civil Procedure. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

ANDERSON'S CASE

Congressman Anderson originally was a candidate for the Republican nomination for President. However, on April 24, 1980, he announced publicly his intention to withdraw as a Republican candidate and to run as an independent. He attempted to have his name stricken in the Republican primary, but the Secretary of State said his withdrawal was untimely, and he was defeated

in the Kentucky Republican primary on May 27, 1980, by Ronald Reagan. This Court denied him preliminary relief to be stricken from the ballot. *See Anderson* v. *Mills*, —— F.Supp. —— (Civ. No. 80-18 E.D. Ky. June 10, 1980).

On May 27, 1980, Anderson's supporters presented to the Secretary of State a petition for his name to be placed on the ballot in November and to name qualified electors for him and a candidate for Vice President. The petitions complied with the requirements of KRS 118.315, including 8600 names thereon. However, the Secretary of State rejected it as being untimely. She maintained that the petition had to be filed on or before April 2, 1980, in accordance with KRS 118.365(3); and that Anderson was disqualified under the "sore loser" law, KRS 118.345, as he had been defeated in the primary election.

GREAVES' CASE

In the companion case involving Percy L. Greaves, his supporters on April 1, 1980, presented to the Secretary of State a petition for his placement on the November ballot. This petition was also legally sufficient in all respects save one, at least according to the Secretary of State. Whereas the Anderson petition had a sufficient number of signatures but was untimely, this petition for Greaves was timely but had an insufficient number of signatures. It had 1,086 signatures, thus short of 5,000 required under KRS 118.315(2).

RELIEF SOUGHT

Although the Anderson case was originally brought under the diversity jurisdiction of this Court, pursuant to 28 U.S.C. § 1332 (as Anderson was then the only plaintiff), the complaint was subsequently amended. Both cases now seek injunctive and declaratory relief under

28 U.S.C. §§ 1331, 1343(3) and 2201-02, incorporating 42 U.S.C. § 1983. The plaintiffs in the Greaves case also assert their rights under 28 U.S.C. § 2284 and 42 U.S.C. § 1982, but the Court finds those statutes inapplicable.

Nevertheless, this Court has jurisdiction of the matter under 28 U.S.C. §§ 1343(3) and 2201-02, incorporating 42 U.S.C. § 1983. There might be some question of this Court's jurisdiction under 28 U.S.C. § 1331, inasmuch as there must be $10,000 in controversy. In the Anderson case, there is proof of more than that amount in controversy, *see Anderson* v. *Mills*, *supra*, but in the Greaves case, there is not. Therefore the Court will decline to rule on that issue, for jurisdiction is already predicated under 28 U.S.C. § 1343.

Plaintiffs seeks to redress rights under various parts of the Constitution, including Article II, Section 1, Article IV, Article VI, and the First, Fifth, Ninth, Twelfth, and Fourteenth Amendments. Both candidates desire the Secretary of State to be directed to place their names on the November general election ballot.

ABSTENTION

The first issue to be reached is whether this Court should abstain from deciding the case until a state court is allowed to pass on the issue of state law, under the rule from *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). Assuming there was time to obtain relief in a state court, the issues in this case seem appropriate for abstention. There is ample uncertainty in the state law involved here, as will be seen *infra*, and a decision by a state court that KRS 118.365(3) and 118.345 are not applicable to presidential elections would obviate the need to consider most, if not all, of the constitutional issues here.

The rule favoring abstention is based upon a need for courts to avoid decisions of constitutional issues whenever

possible. *See Siler* v. *L. & N. R.R.*, 213 U.S. 175 (1909). Thus, where, as here, the challenged state statute is susceptible of an interpretation by the state courts that would avoid the federal constitutional question, then abstention is appropriate. *See Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 306 (1979).

On the other hand, time here is of the essence. Political campaigns are not started like a motor vehicle. They require time to organize and raise funds. If this Court were to abstain now in favor of a state proceeding, the parties might not obtain more than a decision of a state circuit court, as an appeal would not be likely completed before November. There are, as of the time of the opinion, fewer than 90 days remaining until the general election in November. Although the time for abstention here is not as short as in *Kay* v. *Austin*, 621 F.2d 809 (6th Cir. 1980), nevertheless, the same reasoning applies here, precluding abstention. Moreover, it is doubtful whether the issue raised by Greaves concerning the requirement of 5000 signatures on the ballot, could be decided in any way under the state law without raising a constitutional question. Therefore, the Court declines to abstain under the circumstances of these cases.

STATE STATUTES

When the constitutionality of a state statute is brought into question, if the Court can decide it on other than constitutional grounds, it should do so. *See Siler* v. *L. & N. R.R.*, *supra*. Moreover, if the constitutionality of a statute is challenged, the Court should try not to destroy it but to construe it, if consistent with the will of the legislature, so as to comport with constitutional limitations. *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973); *Kay* v. *Austin*, *supra*.

1. *Filing Deadline.*

KRS 118.365(4) provides in part:

> Petitions and certificates of nomination for electors of President and Vice President of the United States shall be filed with the secretary of state not less than fifty-five (55) days prior to the date fixed by law for the election of such electors.

That language clearly says petitions for presidential electors are to be filed on or before 55 days preceding the November general election. Otherwise, the use of the word "petition" would be considered as surplusage, as maintained by the defendants. All parties readily admit that the major parties, Republicans and Democrats, do not nominate their candidates until July and August. Thus, the language in this statute about "certificates of nomination" clearly applies to the procedures for nomination by convention applicable to party candidates under KRS 118.325(2).

Defendants argue that KRS 118.365(3) applies not only to other candidates but to presidential candidates as well. If the legislature intended that result, it could have easily omitted the word "petitions" in subsection (4) of that statute. Therefore, subsection (4) applies to presidential candidates, so petitions which are otherwise legally sufficient must be accepted by the Secretary of State when filed not less than 55 days before the general election.

Althoug defendants cite *Pratt* v. *Begley*, 352 F.Supp. 328 (E.D. Ky. 1970) (three-judge court), *aff'd*, 409 U.S. 943 (1972), in support of their argument that the earlier deadline of April 2, is not unconstitutional, that case is not applicable here. It involved the filing deadline for members of Congress and did not concern this specific provision, KRS 118.365(4), for President. Thus, that deadline for congressional candidates put the independent on the same time table as party candidates. Here, as party candidates do not have to be named until a date 55

days before the general election, it is only logical to believe that it is the same deadline required for independent candidates.

2. *"Sore Loser" provision.*

The "sore loser" provision of KRS 118.345 does not apply to presidential candidates. It provides in part as follows:

> (1) No candidate who has been defeated for the nomination for any office in a primary election shall have his name placed on voting machines in the succeeding regular election as a candidate for the same office for the nomination to which he was a candidate in the primary election, except that if a vacancy occurs in the party nomination for which he was a candidate in the primary election his name may be placed on voting machines for the regular election as a candidate of that party if he has been duly made such party nominee after the vacancy occurs as provided in KRS 118.105.

A New Mexico statute somewhat similar to this law was held inapplicable to the presidential election there. *See Anderson* v. *Hooper*, —— F.Supp. —— (No. 80-432-M.D.N.M. July 9, 1980). Apart from that decision, however, the language of the Kentucky statute is clearly not applicable to presidential elections, for the candidate is not defeated in Kentucky in the primary election. Defeat only comes at the convention. To decide otherwise might preclude the ultimate nominee at the convention from appearing on the general election ballot, if he lost the Kentucky primary election. Obviously, that result was never intended by the Kentucky General Assembly.

Moreover, as all parties agree, the "sore loser" law was in effect for some time before the presidential primary election law was enacted in Kentucky in 1976. Although KRS 118.345 was amended in 1974, when the

presidential primary law, KRS 118.550 et seq., was passed, there is no legislative history to demonstrate that the Kentucky legislature meant to include presidential candidates under KRS 118.345. The defendants here have agreed that Kentucky law does not specifically contemplate independent candidates for president.

3. *Signature Requirement.*

KRS 118.315(2) provides:

> A petition of nomination for a state officer, or any officer for whom all the electors of the state are entitled to vote, shall contain five thousand (5,000) petitioners; . . . . The petition shall state . . . that he [the candidate] is legally qualified to hold the office, and that the subscribers desire, and are legally qualified, to vote for the candidate.

Before 1978, the law required only 1,000 signatures for a state-wide office. Plaintiff Anderson is not concerned with this statute, for his petition had more than 5,000 signatures. However, the plaintiffs in the Greaves case maintain that this statute violates rights under the First, Fifth and Fourteenth Amendments to the Constitution. Specifically, they assert that it infringes upon their right to association and expression, denies them equal protection of the law, and denies them their right of franchise without due process of law. They do not allege any specific Fifth Amendment violations, however, and the Court finds none.

This statute cannot be interpreted so as to avoid the constitutional issue; it clearly applies to an independent candidate for President. The requirement of 5,000 signatures is clearly constitutional. This number of voters necessary to sign the petition is less than one per cent (actually about 0.03%) of the eligible pool of voters in Kentucky. In addition, there are no geographical limitations, closed-in time limitations, or requirements for

the persons signing the petition, except that they be qualified voters who assert that the candidate is qualified and they desire to vote for him. This statute has apparently not been unduly restrictive for Congressman Anderson, or third-party candidates for the Libertarian Party, Respect for Life Party, Socialist Workers Party, Citizens Party, and the Communist Party. They have filed petitions with more than 5,000 signatures each, even though some of them have not appeared on the Kentucky ballot before, and some of those better known, such as the Socialist Workers Party and the Communist Party, have received fewer than 1,000 votes in the last two presidential elections in Kentucky.

There is ample authority for upholding a minimum petition requirement such as this. In *Jenness* v. *Fortson*, 403 U.S. 431 (1971), the Georgia law requiring the signatures of five per cent of the total eligible electorate was upheld and determined not to violate the freedoms of speech and association guaranteed under the First and Fourteenth Amendments. Moreover, the Court held that this law did not deny nonparty candidates to equal protection of the laws under the Fourteenth Amendment. The state has an interest in requiring "some preliminary showing of a significant modicum of support," *id.* at 442, before placing the name of the candidate on the ballot, if for no other reason, to avoid "confusion, deception and even frustration of the democratic process at the general election." *Id. Accord, American Party of Texas* v. *White*, 415 U.S. 767 (1974), (upholding a requirement of 1% of the vote cast for governor in the last general election). Unlike *Storer* v. *Brown*, 415 U.S. 724 (1974), there is no disqualification here of a person who voted in the primary. Under Kentucky law, one is disqualified if he or she signed another petition for the same office, but the defendants do not check petitions for this and have not asserted this as a bar to any petition filed here.

Plaintiffs in the Greaves case also say that the signature requirement statute is unconstitutional because those signing the petition must express their desire to vote for the named candidate. They maintain that this is not required for party candidates, and that it forces persons to reveal their support for a candidate, thus violating their right to a secret ballot, and their freedoms guaranteed under the First and Fourteenth Amendments. This is a unique argument, and the parties have cited no authority in support of it. The Court finds that those signing this petition do little more than those signing other petitions, less indicative of their voting preferences, such as those found in California law in *Storer* v. *Brown*, *supra*, or Texas law, in *American Party of Texas* v. *White*, *supra*. The same compelling state interest that existed in those cases exists here and is sufficient to uphold the requirement of 5,000 signatures. As there is still some time to act, plaintiff Greaves and his supporters may still be able to get on the November ballot, if they can obtain the additional signatures for their petition.

The Court has considered the learned opinions from *Anderson* v. *Morris*, —— F.Supp. —— (No. 4-80-1632 D. Md. Aug. 6, 1980); and *Anderson* v. *Celebrezze*, —— F.Supp. —— (No. C-2-80-400 S.D. Ohio July 18, 1980). Although they are persuasive, they are inapplicable because they decided constitutional issues that were not reached here. Moreover, the constitutionality of the signatures requirement was not decided in those cases.

Therefore, the Court will order the defendant Secretary of State to place the name of John B. Anderson on the general election ballot this November, but will not order the placement of Percy L. Greaves on the ballot, unless by the deadline specified in KRS 118.365(4), that is, 55 days before the general election, he presents a petition to the Secretary of State with the requisite num-

ber (5,000) of qualified signatures thereon. An Order in accordance with this Opinion will be issued.

This 14 day of August, 1980.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

A True Copy Attest

Davis T. McGarvey
Clerk
U.S. District Court

By /s/ Hilda T. Watkins
D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 80-18

JOHN B. ANDERSON, ET AL.,
Plaintiffs,

vs.

FRANCES JONES MILLS, ET AL.,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion and Order of even date, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The petition of nomination for electors for John B. Anderson were filed timely with the defendant Secretary of State.

2. The defendant Secretary of State shall place the name of John B. Anderson on the Kentucky ballot in the November 4, 1980, presidential general election, if his petition has otherwise met the requirements of Kentucky's election laws.

3. The defendants shall pay the costs of this action.

This 14 day of August, 1980.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

A True Copy Attest

Davis T. McGarvey
Clerk
U.S. District Court

By /s/ Hilda F. Watkins
D.C.

Notice is hereby given of the entry of this order or judgment on August 15, 1980.

Davis T. McGarvey
Clerk

BY: /s/ Hilda F. Watkins
D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 80-17

PERCY L. GREAVES, ET AL.,
Plaintiffs,

VS.

FRANCES JONES MILLS, ET AL.,
Defendants.

Civil Action No. 80-18

JOHN B. ANDERSON, ET AL.,
Plaintiffs,

VS.

FRANCES JONES MILLS, ET AL.,
Defendants.

ORDER

In accordance with the Memorandum Opinion of even date, it is hereby

ORDERED AS FOLLOWS:

1. The motion for summary judgment by plaintiffs John B. Anderson and others in Civil Action No. 80-18, filed on July 11, 1980, be and is sustained.

2. The motion for summary judgment by the defendants in Civil Action No. 80-18, as filed on July 11, 1980, be and is denied.

3. The motion for summary judgment by the plaintiffs, Percy L. Greaves and others, in Civil Action No. 80-17, filed on July 14, 1980, be and is sustained in part and denied in part.

4. The motion for a temporary injunction by the plaintiffs, Percy L. Greaves and others, in Civil Action No. 80-17, filed on July 14, 1980, be and is denied.

5. The motion for summary judgment filed by the defendants on July 11, 1980, in Civil Action No. 80-17 be and is sustained in part and denied in part.

6. The issue of awarding attorney's fees is specifically reserved.

This 14 day of August, 1980.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

A True Copy Attest

Davis T. McGarvey
Clerk
U.S. District Court

By /s/ Hilda F. Watkins
D.C.

FILED
SEP 2 - 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-182

ANTHONY J. CELEBREZZE, JR.,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR
THE STATE OF OHIO,
Petitioner,

V.

JOHN B. ANDERSON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF MAINE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF OHIO,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF MAINE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF AMICUS CURIAE

The interests of the amicus curiae and its reasons for urging this court to review the decision in *Anthony J. Celebrezze, Jr. v. John B. Anderson, et al.*, — F. Supp. —, No. C-2-80-400 (S.D. Ohio July 18, 1980), *appeal docketed*, No. ——, U.S. Court of Appeals for the Sixth Circuit, July 30, 1980, are as follows:

Amicus is a sovereign state which, like Petitioner, amicus Maryland and two other states, has a filing deadline for independent candidates which has been challenged by Respondent John B. Anderson as unconstitutionally interfering with his associational rights and the rights of his supporters to cast their votes for him. The United States District Court for the District of Maine found Maine's April 1 filing deadline unconstitutional. *Anderson v. Quinn*, — F. Supp. —, Civil No. 80-176P (D. Me. Aug. 11, 1980). The basis for the District Court's decision was that the deadline imposed substantial and unequal burdens on the rights of association and franchise of Respondent Anderson and his supporters without being supported by any compelling state interest. Maine has filed a notice of appeal to the United States Court of Appeals for the First Circuit.

Maine's interest in this Court's action in *Celebrezze v. Anderson* is significant. Ohio's filing deadline is so close to Maine's that it would appear that the legal issues presented are identical in all material respects.

As in Maryland, New Mexico and Ohio, the District Court in Maine failed to apply the "reasonably diligent

candidate" standard announced by this Court in *Storer v. Brown*, 415 U.S. 724 (1974) and applied thereafter in *Mandel v. Bradley*, 432 U.S. 173 (1977), to determine whether the burden on Respondent Anderson to comply with Maine's deadline was unconstitutionally severe. The District Court made no reference to the fact, established in the record, that 12 independent candidates qualified for the 1980 general election ballot and that, of these 12, three are candidates for President of the United States. Moreover, that court, like the other three District Courts which have ruled on these issues, also ignored the very real distinctions between the processes through which party and non-party Presidential candidates achieve ballot access which would permit the State to treat them differently without violating the Constitution and which would trigger the application of the "reasonably diligent candidate" test.

Given the similarity of the legal issues presented in all of the cases so far decided in which John Anderson has challenged filing dates for independent candidates, it would appear almost certain that a decision on the merits in the Ohio case would control the disposition on appeal of the other cases.[1] Ohio's petition for certiorari should therefore be promptly considered so that the voters and relevant state officials in all of the affected states will know prior to the general election whether John Anderson is entitled to be on their ballots.

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[1] At this time, two of the three other states in which decisions have been rendered in the District Court, Maine and Maryland, have appealed to the Court of Appeals. The decision in New Mexico does not appear to be a final judgment.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT OHIO'S PETITION FOR WRIT OF CERTIORARI IN ORDER TO PROVIDE CERTAINTY TO THE STATES INVOLVED ON THE ISSUE OF THE CONSTITUTIONAL STANDARD APPLICABLE IN INDEPENDENT FILING DEADLINE CASES.

This case satisfies the "imperative public importance" standard set out in Rule 18 of the Rules of the United States Supreme Court. Because of the number of states involved and the effect of a ruling on the impending general election, it is critical that this Court grant Ohio's petition for a writ of certiorari. Ohio, in its petition, and Maryland, in its brief as *amicus* in support of the granting of the petition, have very persuasively set out the reasons this writ should be granted. Maine generally agrees with these arguments and therefore will not repeat them herein.

Maine does wish to comment briefly on a single area of analysis which was neglected by all the courts below. Maine argued in the District Court that, because of the differences in procedure for achieving ballot position between party and non-party Presidential candidates, no legitimate comparison between the two classes could be made, and there could therefore be no invidious discrimination in violation of the Equal Protection Clause. In *Anderson v. Quinn*, *supra*, the District Court rejected this argument. Its view of the proper classes to be compared in order to determine whether Maine's filing date violated the Equal Protection Clause of the Fourteenth Amendment was described as follows:

> Plainly, the burdens imposed on independent Presidential candidates must be compared with those im-

> posed on other candidates for the same office, not with candidates for other offices who are elected *through an entirely different process.*
>
> *Anderson v. Quinn, supra,* slip opinion at 7 (footnote omitted) (emphasis added).

The quotation from the Maine opinion reveals the District Court's failure to appreciate that the process for party Presidential candidates is far different from the process for independents for the same office and therefore that the court's suggested comparison is wholly inappropriate. Ohio has argued cogently in its petition for a writ of certiorari (at 15-21) that the lower courts' inaccurate comparisons of party and non-party Presidential candidates ignore this Court's decisions in *Jenness v. Fortson,* 403 U.S. 431 (1971); *American Party v. White,* 415 U.S. 767 (1974) and *Storer v. Brown, supra,* by treating similarly classes of candidates which are not similarly situated. As this Court noted in *Jenness v. Fortson, supra,* 403 U.S. at 442, the "gravest discrimination can lie in treating things that are different as though they were exactly alike."

Applying this principle to the issue at hand, the District Courts erred by focusing solely on filing deadlines without giving due consideration to the fact that the vast differences in the ballot access procedures produce vastly different burdens on potential candidates. To cite but one example, since a party may have only one Presidential nominee, an individual seeking his party's nomination must compete with all the other aspirants for a single ballot position.[2] This formidable burden is

[2] As a matter of political reality, moreover, such competition begins well before April 1 of the year in which the Presidential election is held.

not placed on the person who seeks ballot access as an independent candidate because there is no limit on the number of such candidates. This difference, however, does not constitutionally entitle an individual to appear on the ballot under his party's designation if he is able to satisfy the same petition filing requirements as are imposed on independents.

We raise this example for two reasons. First, it demonstrates the doubtful manner in which the District Courts applied equal protection analysis in these cases in light of the great dissimilarities between independent and party Presidential candidates. Second, even if equal protection analysis requires that the burdens placed on party and non-party Presidential candidates be compared, it is a gross oversimplification to make that comparison in the context of a single requirement, namely, the date of the filing deadline. It is Maine's contention that the processes must be viewed in their entirety and that when such a comparison is undertaken, there is no basis for concluding, as the Maine, Maryland and Ohio District Courts have done, that independent candidates are subjected to greater burdens and thus denied equal protection.[3]

CONCLUSION

For the reasons stated, Maine as amicus curiae strongly urges this Court to grant Ohio's petition for a writ of certiorari in this case. Significant questions of public importance are posed, and the District Courts

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[3] To the extent that the successful utilization of a procedure is a measure of burdensomeness, it may bear noting that, excluding Anderson, there will be three independent Presidential candidates on Maine's general election ballot, but only two party candidates for that office.

which have ruled have failed to take into consideration decisions of this Court which appear to be not only relevant but dispositive.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-182

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OCTOBER TERM, 1980

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v.

JOHN B. ANDERSON, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The State of Maryland, as amicus curiae, respectfully urges that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, which was entered in the above captioned case on July 18, 1980 and which has been appealed to the Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

1. Whether the ballot access decisions of this Court require that the constitutionality of a state's filing deadline for independent presidential candidates be gauged in light of the past experience of reasonably diligent independent candidates and the political realities of presidential campaigns, and only after a factual determination of the alleged severity of the deadline.

2. Whether Ohio's March filing deadline for independent presidential candidates, which actual experience has shown not to deter reasonably diligent independent candidates from obtaining a place on the state's general election ballot, can be constitutionally justified as preserving political stability by denying ballot access by defeated and disaffected party candidates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-182

ANTHONY J. CELEBREZZE, JR.,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF OHIO,
Petitioner,

v.

JOHN B. ANDERSON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF AMICUS CURIAE

The interests of the amicus curiae and its reasons for urging this court to review the decision in *Anthony J.*

Celebrezze, Jr. v. John B. Anderson, et al., ___ F. Supp. ___, No. C-2-80-400 (S.D. Ohio, July 18, 1980), *appeal docketed*, No. ___, U.S. Court of Appeals for the Sixth Circuit, July 30, 1980, are as follows:

Amicus is a sovereign state, which like Petitioner and three other states, has an independent candidate filing deadline challenged by Respondent John B. Anderson as unconstitutionally infringing on his rights of political association and the rights of others to cast their vote for him. Just three years ago, the constitutionality of Maryland's filing deadline, which at that time required statewide candidates to file more than 50,000 valid signatures by early March in presidential election years and by early July in gubernatorial election years, was at issue before this Court. *Mandel v. Bradley*, 432 U.S. 173 (1977). In that case, this Court held that a three-judge district court had erred in making the "assumption that the filing deadline by itself was *per se* illegal," *Id.* at 178, and ordered the case remanded for application of the principles of *Storer v. Brown*, 415 U.S. 724 (1974). Specifically, the lower court was told to examine what the past experience of independent candidates in Maryland indicated about the burdens of the filing deadline, whether other features of Maryland election law moderated whatever burden that existed, and what difficulties an independent candidate experienced in gathering signatures by the deadline. 432 U.S. at 177-78. On remand, the district court made the factual findings required by this Court and concluded that to require an independent candidate for statewide office to gather more than 50,000 valid signatures by an early March filing deadline unconstitutionally burdened Bradley's rights. *Bradley v. Mandel*, 449 F. Supp. 983 (D. Md. 1978). Responding to these decisions and adopting an approach suggested by the district court, the General Assembly of Maryland moderated the burden of the filing deadline and attuned the law to the situation

of the reasonably diligent candidate that Bradley was found to be, by enacting a two-stage filing deadline. Chapter 108 of the Laws of 1979. A certificate of candidacy and one-third of the necessary signatures (or approximately 18,500) were required of an independent candidate for statewide office by the March deadline — the remaining signatures were due in August. *Id.*

It did not take long for experience to validate the constitutionality of Maryland's new filing deadline statute. Where previously no independent candidate for statewide office in Maryland had been able to qualify by a March deadline without judicial intervention, the first and only independent candidate for statewide office to try to qualify (Libertarian Party presidential candidate Edward Clark) filed sufficient signatures by the March filing deadline. *See Defendants' Memorandum of Law in Support of Motion for Summary Judgment* at 21-22, *Anderson v. Morris,* ___ F. Supp. ___, Civil Action No. Y-80-1632 (D. Md. Aug. 6, 1980), *appeal noted* Aug. 8, 1980.[1] Nevertheless, Maryland fared no better than Ohio in attempting to focus the reviewing court's attention on the relevant experience of independent candidates in the state or in convincing the court to make a factual analysis of the burdens allegedly imposed by the deadline. *Anderson v. Morris, supra.*

Maryland is vitally affected by what happens in this Court in *Celebrezze v. Anderson.* Ohio, like Maryland, has a March deadline. The past experience of qualifying independent candidates in both states was ignored, along with the principles of *Storer* and *Bradley.* Finally, the district court in Maryland relied extensively on the Ohio opinion. But more importantly, without prompt considera-

[1] Past experience also showed that no independent candidate for statewide office who attempted to comply with the statute (even Bradley) had any difficulty filing a certificate of candidacy by the March date.

tion by this court of Ohio's petition for certiorari, Maryland may be denied an authoritative and timely determination with respect to the constitutionality of its candidate filing deadline. If John Anderson is not constitutionally entitled to a place on the general election ballots in Ohio, Maryland and the other states where deadlines have been challenged, the states, their voters and the candidates should know that before the general election.

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY TO PREVENT LOWER FEDERAL COURTS FROM MISAPPLYING THIS COURT'S DECISIONS ON THE CONSTITUTIONALITY OF BALLOT ACCESS RESTRICTIONS AND CANDIDATE FILING DEADLINES AND FROM UNNECESSARILY AFFECTING THE VOTE IN FIVE STATES AND POSSIBLY ALTERING THE RESULT OF THE 1980 PRESIDENTIAL ELECTION.

In *Mandel v. Bradley,* 432 U.S. 173 (1977), this Court criticized a lower court's assumption that a March filing deadline for independent candidates was facially unconstitutional. The lower court in *Bradley,* without any factual analysis, had determined that the deadline served no compelling interest. This Court rejected such an approach, mandating lower courts to engage in the heavily factual, heavily pragmatic analysis of the burdens such a deadline would impose on the "reasonably diligent independent candidate." *Id.* at 177-78. On the basis of filing deadline decisions involving Respondent Anderson in Ohio, Maryland, New Mexico and Maine, it would appear that lower courts have learned nothing from the *Bradley* decision.

Instead these courts in facially invalidating filing deadlines have ignored not only the holding of *Bradley* but a decade of this Court's filing deadline decisions which inevitably led to the result reached by this Court in *Bradley. See Williams v. Rhodes,* 393 U.S. 23 (1968) (filing deadline of 9 months before general election struck down but only in conjunction with other restrictive ballot access

provisions); *Jenness v. Fortson,* 403 U.S. 431 (1970) (69-day pre-primary filing deadline occurring 5 months before general election upheld); *Auerbach v. Mandel,* 409 U.S. 808 (1972) (summary affirmance of decision upholding filing deadline occurring 8 months before general election); *Sweetenham v. Gilligan,* 409 U.S. 942 (1972) (summary affirmance of decision upholding same filing deadline at issue in *Williams*); *Pratt v. Begley,* 409 U.S. 943 (1972) (summary affirmance of decision upholding filing deadline of 7 months before general election); *Tucker v. Salera,* 424 U.S. 959 (1976) (summary affirmance of decision invalidating filing deadline of 8 months before the general election but only because it was coupled with a 21-day signature gathering period).

Moreover, the reasons the lower courts have offered for refusing to engage in the *Storer-Bradley* analysis are singularly unpersuasive. The lower court in *Celebrezze* erroneously held that *Bradley* was not a filing deadline case and stated that in any event the reasonably diligent candidate inquiry could never aid it in gauging the constitutionality of a filing deadline standing by itself.[2] Thus, the court's only inquiry was whether the deadline served a compelling interest. The lower court judge in the Maryland case turned the *Storer-Bradley* inquiry completely on its head by stating that he would not apply the test until he concluded that the state had a compelling interest. *See Anderson v. Morris, supra,* (Slip Opinion at 6) ("Only after the court is satisfied that such a compelling state interest exists will it reach the issue of how drastic the restrictions are — that is, could a reasonably diligent candidate comply?"). However, the *Storer-Bradley* analysis must be the trial court's first step. The factual analysis is necessary to determine "how well state interests are

[2] The *Celebrezze* court also misread *Storer* and *Bradley* only to require an examination of whether the plaintiff-candidate was reasonably diligent.

served and how great is the infringement on constitutionally protected interests. . . ." Developments in the Law — Election Law, 88 Harv. L. Rev. 1111, 1142-43 (1975). If the burdens are found not to be substantial or excessive, the provision should not be invalidated. *Buckley v. Valeo,* 424 U.S. 1, 101 (1976); *Bullock v. Carter,* 405 U.S. 134, 143 (1972).

If the courts in Ohio, Maryland and New Mexico and Maine had applied *Storer* and *Bradley* and looked at the experience of independent candidates or the realities of presidential campaigns, what would they have found? These courts would have learned that there was little substance to Respondent Anderson's claim that he was forced to make up his mind too early. Of the 11 candidates running for the major party presidential nominations (including Anderson), all announced many months before March 1980 — anywhere from 26 months to 11 months before the general election. *Defendants' Memorandum of Law in Support of Motion for Summary Judgment* at 21, *Anderson v. Morris, supra.*[3] Early campaigning was also a characteristic of true independent candidates for president in 1980 as well as other past serious independent presidential candidates such as George Wallace and Eugene McCarthy. *Id.* Lower courts in Ohio, Maryland and New Mexico and Maine paid no attention to these facts because of their shaky assumption that some party candidate could decide to run for president at the summer conventions.[4] These courts also did not want to hear about the

[3] Thus, the necessary predicate for Respondent's equal protection claim — a benefited class of party candidates and a burdened class of independents — was clearly absent.

[4] With 37 presidential primaries in 1980 and the availability of federal financing for campaigns, the chances of a party nominating someone other than the victor in the primaries has become exceedingly remote. *See* Nelson W. Polsby and Aaron Wildavsky *Presidential Elections* (5th Ed. 1980) at 148. In fact, not since 1952 has a major party convention gone beyond the first ballot in choosing a candidate.

independent candidates who were able to meet a March filing deadline. For example, in Ohio five independent presidential candidates were accorded access to the general election ballot in 1976; in 1980 another five timely filed nominating petitions by the March deadline. Such evidence demonstrates Ohio's filing deadline is no substantial burden for the true independent. It does not force him to make up his mind too early. It disadvantages only one kind of candidate, a defeated and disaffected party candidate.

Courts in Ohio and Maryland have concluded that a state's asserted compelling interest in maintaining political stability by keeping defeated and disaffected party presidential candidates from running as independents was served by an early filing deadline only by "mere happenstance." *Anderson v. Celebrezze, supra* at 21; *Anderson v. Morris, supra* at 11. Not only are these lower courts wrong on whether a ballot access provision such as a filing deadline can serve the interests of a "sore loser" statute, *see Storer v. Brown, supra* at 743; *Williams v. Tucker,* 382 F. Supp 381 (M.D. Pa. 1974), but by ignoring *Storer v. Brown* and the relevant facts, they refused to recognize how well the March deadline serves that interest without unnecessarily burdening the rights of true independents.

Finally, it is important to note that the refusal of these lower courts to come to grips with the principles of this Court's ballot access cases will undoubtedly have far-reaching consequences. The vote in Ohio, Maryland, New Mexico, Kentucky and Maine will obviously be affected. With a close presidential race and the possibility that the next president may be chosen by the House of Representatives, the vote in these states may loom as a large factor. In short, the *Celebrezze* case raises issues of immediate national importance.

CONCLUSION

For all of these reasons, the State of Maryland urges that this Court's determination of the urgent questions raised by Ohio is worthy of the most serious consideration. Thus, this Court should grant Ohio's petition for certiorari and advance the case for prompt argument and decision before the 1980 general election.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 6 1980
MICHAEL RODAK, JR., CLERK

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BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The State of New Mexico, as amicus curiae, respectfully urges that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, which was entered in the above captioned case on July 18, 1980 and which has been appealed to the Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

1. Whether the ballot access decisions of this Court require that the constitutionality of a state's filing deadline for independent presidential candidates be gauged in light of the past experience of reasonably diligent independent candidates and the political realities of presidential campaigns, and only after a factual determination of the alleged severity of the deadline.

2. Whether Ohio's March filing deadline for independent presidential candidates, which actual experience has shown not to deter reasonably diligent independent candidates from obtaining a place on the state's general election ballot, can be constitutionally justified as preserving political stability by denying ballot access by defeated and disaffected party candidates.

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BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF AMICUS CURIAE

The interests of the amicus curiae, the State of New Mexico, and its reasons for urging this court to review the decision in *Anderson v. Celebrezze,* ____ F.Supp. ____, No. C-2-80-400 (S.D. Ohio, July 18, 1980), appeal docketed, No. ____, U.S. Court of Appeals for the Sixth Circuit, July 30, 1980, are as follows:

Like Petitioner, the State of Ohio, New Mexico has a statutory deadline for independent candidates which was challenged by Respondent John B. Anderson in *Anderson v. Hooper,* ____ F.Supp. ____, No. 80-432-M Civ. (D.N.M., July 8, 1980 and August 12, 1980), as being an infringement of his constitutional rights of political association and on the rights of others to cast their vote for him for president of the United States. Section 1-8-52 NMSA 1978 established the challenged deadline and provides in pertinent part that

> Declarations of independent candidacy and nominating petitions shall be filed with the proper filing officer during the period commencing at 9:00 a.m. on the first Tuesday of March of each even-numbered year and ending at 5:00 p.m. on that same day. . .

On July 8, 1980, the United States District Court for the District of New Mexico entered an order enjoining the New Mexico Secretary of State from enforcing the March 4, 1980, independent candidate filing deadline against Anderson. In its Memorandum Order and Opinion, the District Court held that Section 1-8-52 NMSA 1978 was unconstitutional "on its face." On August 12, 1980, on cross motions for summary judgment, the District Court issued a Memorandum Opinion and Order making the preliminary injunction permanent and stating that Section

1-8-52 "impermissibly burdens fundamental rights" and "invidiously discriminates against independent presidential candidates."

Although it has been determined that the particular and immediate interests of New Mexico were such that the decisions of the District Court would not be appealed by the Secretary of State and consequently that Anderson's name will be placed on the 1980 New Mexico general election ballot, New Mexico is nevertheless vitally affected by the questions raised in *Celebrezze v. Anderson*. The constitutionality of a March filing deadline for independent candidates remains a matter which will have to be considered by the New Mexico legislature in the upcoming 1981 legislative session. The outcome of this case is critical to that consideration.

SUMMARY OF ARGUMENT

The district court decisions in Ohio, Maryland, Maine and New Mexico with respect to the constitutionality of early filing deadline statutes are contrary to this Court's ruling in *Mandel v. Bradley,* 432 U.S. 173 (1977).

ARGUMENT

REVIEW IS NECESSARY TO PREVENT LOWER FEDERAL COURTS FROM MISAPPLYING THIS COURT'S DECISIONS ON THE CONSTITUTIONALITY OF BALLOT ACCESS RESTRICTIONS AND CANDIDATE FILING DEADLINES AND FROM UNNECESSARILY AFFECTING STATE LAWS GOVERNING FILING DEADLINES.

In *Mandel v. Bradley,* 432 U.S. 173 (1977), this Court rejected a lower court's assumption that a March filing deadline for independent candidates was *per se* illegal. The

lower court in *Bradley,* without undertaking an independent examination of the merits, held that the deadline served no compelling interest. This Court reversed the lower court's decision and required that it make a factual determination of the burdens such a deadline would impose on a "reasonably diligent independent candidate" before it ruled on the constitutionality of the statute.

In spite of the clear direction given by this Court to the district courts for the consideration of filing deadline statutes, the District Court for the District of New Mexico did not even cite *Mandel v. Bradley* in either of the opinions issued in *Anderson v. Hooper.* Contrary to *Mandel v. Bradley,* the District Court held that the New Mexico filing deadline could not be justified by a compelling state interest without making any finding that Anderson would in fact have had difficulty in meeting that deadline.

What gives rise to the several filing deadline cases brought by Respondent Anderson is not that the various statutory deadlines are too early, but rather that Respondent Anderson decided too late to run as an independent. That there is nothing inherently burdensome in an early filing deadline was plainly recognized by this Court in *Mandel v. Bradley.* That the district courts have failed to follow the rule set out by this Court for determining the constitutionality of filing deadline statutes requires the immediate consideration of the questions presented by Ohio in *Celebrezze v. Anderson.*

CONCLUSION

For all of these reasons, the State of New Mexico urges this Court to grant Ohio's petition for certiorari and advance the case for prompt argument and decision before the 1980 general election.

Respectfully submitted,

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